AN OUTLINE

OF THE LAW OF

Landlord and Tenant

AND OF

Land Purchase In Ireland

FOR THE USE OF STUDENTS

BY

T. HENRY MAXWELL

AN OUTLINE

OF THE LAW OF

LANDLORD AND TENANT

AND OF

LAND PURCHASE

IN IRELAND

FOR THE USE OF STUDENTS

AN OUTLINE

OF THE LAW OF

LANDLORD AND TENANT

AND OF

LAND PURCHASE

IN IRELAND

FOR THE USE OF STUDENTS.

By THOMAS HENRY MAXWELL,
M.A., LL.D., Barrister-at-Law.
Sometime Professor of Equity, King's Inn's, Dublin. Part Author of
"Cherry's Irish Land Law and Land Purchase Acts."

DUBLIN:
JOHN FALCONER, 53 UPPER SACKVILLE STREET
1909
Entered at Stationers' Hall.

PREFACE

In this little work I have endeavoured to state the general principles and the main features of the Law of Landlord and Tenant in Ireland, and also to give a sketch of the provisions governing the purchase of land by occupying tenants by means of advances made by the State. I have done so as shortly and as simply as I could. To attain accuracy in a necessarily incomplete discussion of any legal subject is well nigh impossible, but to have gone minutely into detail would have defeated the object I had in view. The superabundance of decided cases and the intricacy and ill-considered drafting of many of the numerous Acts of Parliament relating to Irish land make it hard to give a clear and coherent statement upon this topic, an intimate and thorough knowledge of which is so important to every Irish lawyer.

Since Mr. Richey's book, published in 1880 (which I have used in the chapter on the Land Act of 1870), no work has been published which could usefully be studied by those who desire to obtain a preliminary and elementary knowledge of the Irish Land Laws. I have myself, both as a pupil and as a teacher, found the need of some such help. My attempt to supply this need will, I know, meet with indulgence from those who realise the difficulties to be surmounted. I have embodied many notes from Mr. Cherry's work on the Irish Land Acts (in the compilation of which I had a share). I

have quoted some important cases in support of the propositions in the text, and I have given references to the various sections of the Land Acts where the law depends on express enactment. But I would recommend the student *not* to refer either to the cases or to the sections until he has acquired a general notion of the subject. To do so is more likely to confuse than to help him. I desire to express my thanks to my friend Mr. Longfield for some valuable suggestions, for which I am indebted to him.

T. Henry Maxwell.

June, 1909.

CONTENTS

APPENDIX.

TABLE OF CASES

TABLE OF STATUTES

PART I.

LAND LAW

INTRODUCTION.

SOURCE OF IRISH LAND LAW.

WHAT is the law relating to landlord and tenant in Ireland? Where is it to be found, and what are its sources?

The Irish law on this subject is the English common law as modified or superseded by statute.

The English common law was introduced into Ireland in the reign of King John, and it is said (*a*) that after the conquest of Ireland by King Henry the Second the laws of England were received and sworn to by the Irish nation assembled at the Council of Lismore. In 10 Hen. III. (A. D. 1226), the King, by ordinance addressed to the Justiciar, commanded him that he "keep and cause to be kept the laws and customs of our land of England in our land of Ireland, as the Lord King John our father enjoined them to be kept when he was last in that land" (*b*).

In "Doctor and Student" (*c*) the answer to the question what is meant by the "common law" is thus given. "The common law is taken three manner of ways—*First*, it is taken as the law of this realm of England dissevered from all other laws. . . . *Secondly*, the common law is taken as the King's Courts of his Bench or of the Common Place. . . . *Thirdly*, by the common law is understood such things as were law before statute made in that point that is in question; so that that point was holden for law by the

(*a*) Kerr, Blackstone, Vol. I., p. 82.
(*b*) Early Statutes of Ireland, Berry, p. 21.
(*c*) Dial II., chap. 2.

general or particular customs and maxims of the realm, or by the law of reason, and the law of God."

The common law—*leges et consuetudines Angliae*—the general law of England, "by which proceedings and determinations in the ordinary courts of justice are guided and directed" (*a*), consists of doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage—that is, upon common law—for their support.

The first ground and chief cornerstone of the laws of England is general immemorial custom, or common law, declared from time to time in the decisions of the Courts of Justice, which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law (*b*).

Great Britain and Ireland (*c*) were, until 1801, two distinct kingdoms, having separate Parliaments, although having the same King and the same common law, and accordingly no Acts of the English Parliament since the twelfth of King John extended into Ireland (*d*).

The original method of passing statutes in Ireland (*e*) was nearly the same as in England, the chief governor holding Parliaments at his pleasure, which enacted such laws as they thought proper. But by a famous statute of the Irish Parliament held at Drogheda, 10 Hen. VII., c. 22 (1495)—Poyning's Law—all English statutes concerning the public weal were confirmed, and to be used and exercised in Ireland.

Between 1495 and 1782 some statutes were passed assimilating the Irish to the English law, and in 1782, by Yelverton's Act, 21 & 22 Geo. III., c. 48 (Ir.), the provisions of several English statutes were applied to Ireland, including "all statutes heretofore made in England or Great Britain

(*a*) Kerr, Blackstone, Vol. I., p. 52.
(*b*) *Ib.* 57.
(*c*) See Ir. R. 4 C. L. 584, *note.*
(*d*) Kerr, Blackstone, Vol. I., p. 83.
(*e*) *Ib.* 84.

under which any lands, tenements or hereditaments in this kingdom, or any estate or interest therein are, or is holden or claimed, or which any way concern the title thereto, or any evidence respecting the same."

Under the Act of Union (39 & 40 Geo. III., c. 67, and 40 Geo. III. (Ir.), c. 38), the laws and courts of both kingdoms remain as before, except as to appeals to the House of Lords; and every public general statute passed since the Union applies to Ireland unless that country is expressly or by necessary implication excluded.

The Landlord and Tenant Law Amendment (Ireland) Act, 1860 (23 & 24 Vict., c. 154)—Deasy's Act—effected a fundamental change in the theory of the relation of landlord and tenant by basing it upon contract instead of upon tenure, but left the real relation between them in essential points unaltered.

The Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict., c. 46), gave new rights to the tenant—namely, compensation for disturbance and compensation for improvements—and legalised the Ulster Custom.

The Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), was the first interference by the State with rents fixed by contract of the parties, and was confined to yearly tenancies and tenancies less than yearly tenancies. Like all the subsequent Acts, it is limited in its operation to "present" tenants in occupation of agricultural or pastoral holdings.

The Land Law (Ireland) Act, 1887 (50 & 51 Vict., c. 33), gave jurisdiction to fix fair rents in respect of leases in existence at the date of the passing of the Act of 1881 and expiring before August 22, 1980.

The Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict., c. 57), provided for the redemption of their rents by long leaseholders and fee-farm grantees in occupation, with the consent of the lessor or grantor, with the alternative of having a fair rent fixed should consent to redemption be withheld.

The Town Tenants Act, 1906 (6 Edw. VII., c. 54), has applied the principle of compensation for improvements to houses in towns let for business or residential purposes, and compensation for unreasonable disturbance to houses, shops, and buildings occupied for trade or business purposes.

CHAPTER I.

RELATION OF LANDLORD AND TENANT.

Term of Years—Lease—Rent-service, Rent-charge—Relationship of Landlord and Tenant Based on Contract—Right to have Fair Rent fixed or to Purchase—Conacre—Grazing Letting.

All land is in feudal theory *held* of some superior lord. **Absolute ownership in land is unknown to English law.** An "estate" in fee-simple is the greatest interest which the law allows any person to possess in landed property. A tenant in fee-simple is he that *holds* lands or tenements to him and his heirs—holds them since *Quia Emptores* (*a*)—of the King as lord paramount. Thus "tenant" has been defined as "one that holds or possesses lands or tenements by any kind of right, be it for life, years, at will or at sufferance, in dower, curtesy or otherwise."

Tenancy means the mode in which lands are held, the ownership being in one person, the possession in another. If an owner in fee-simple grants to another a lease for a term of years, or for life, he does not dispose of all his estate, for his grantee has a less estate than himself; accordingly, on the expiration of the term of years, or the dropping of the life, the remaining interest will revert to the owner or his heirs. This *reversion* is looked on in law as a continuance of his old estate with respect to himself and his heirs, and to all other persons but the tenant-for-life or for years

(*a*) 18 Ed. 1, s. 1, c. 1.

Term of Years.—"One of the most important kinds of chattel or personal interests in landed property is a term of years, by which is understood not the *time* merely for which a lease is granted, but also the *interest* acquired by the lessee. Terms of years may practically be considered as of two kinds—first, those which are created by ordinary leases, which are subject to a yearly rent, and in respect of which so large a number of the occupiers of lands and houses are entitled to their occupation; and secondly, those which are created by settlements, wills, or mortgage deeds, in respect of which no rent is usually reserved, which are frequently for one thousand years or more, which are often vested in trustees, and the object of which is usually to secure the payment of money by the owner of the land. But, although terms of years of different lengths are thus created for different purposes, it must not, therefore, be supposed that a long term of years is an interest of a different nature from a short one. On the contrary, all terms of years of whatever length possess precisely the same attributes in the eye of the law (*a*).

A tenant's interest, whether under a freehold lease, a fee-farm grant, or a term of years, may be dealt with by settlement or by will, and is subject, as regards its devolution, to the rules of law applicable to property of the class to which it belongs.

Lease.—Lease is defined by the first section of the Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 & 24 Vict., c. 154)—"Deasy's Act"—to mean "any instrument in writing, whether under seal or not, containing a contract of tenancy in respect of any lands in consideration of a rent or return." Formerly a lease was required to be by deed (8 & 9 Vict., c. 106, s. 3), and it was necessary that a reversion should remain in the lessor. As the word "land" in the Act of 1860 includes both corporeal and incorporeal hereditaments of every tenure (section 1), a tenancy from

(*a*) Williams, Real Property, 20th Ed., p. 487.

year to year in an incorporeal hereditament, such as a right of fishing or of shooting, may be created by parol agreement notwithstanding the second section of the Statute of Frauds (7 Wm. III., c. 12 (Ir.)): *Bayley* v. *Marquis Conyngham* (*a*).

Rent-service — Rent-charge. — In the case of a lease for lives or years a tenure was created between the parties, the lessee becoming tenant to the lessor. The rent or annual return made by the tenant in money, labour, or kind is a fixed tribute which issues out of land as part of its actual or possible profit. This rent is a rent-service, for the lessee holds his land of the lessor by the service of paying the rent, and it is recoverable by distress. It differs from a rent-charge which arises on a grant by deed by one person to another, of an annual sum of money, payable out of lands in which the grantor may have any estate. In this latter case there is no tenure between the parties, and such a rent could not formerly have been distrained for unless an express power of distress was given by the deed creating it, as there was no power of distress for a rent-charge at common law. See, however, 4 Geo. II., c. 28, s. 5, and 11 Anne, c. 2, s. 7. (Ir.), and the forty-fourth section of the Conveyancing Act, 1881 (*b*).

Relation of Landlord and Tenant since 1860 founded on Contract.—Prior to the passing of Deasy's Act (*c*) the existence of a reversion was essential to the relation of landlord and tenant, but that Act made a fundamental alteration in the theory of the basis of the relationship of landlord and tenant in Ireland. Section 3 of that Act provides that "The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party

(*a*) 15 Ir. C. L. R. 406.
(*b*) 44 & 45 Vict., c. 41.
(*c*) 23 & 24 Vict., c. 154.

to hold land from or under another in consideration of any rent."

The intention of the Act was to maintain the relation of landlord and tenant with its incidents, even though there was neither tenure nor service to support it, provided there was a contract to create the relation. And though the Act (*a*) abolishes tenure and service, it does not abolish rights such as distress, which depend upon rent-service: *Gordon* v. *Phelan* (*b*). Deasy's Act makes no distinction between agricultural and non-agricultural holdings. This vital distinction as regards subject-matter first became important when the Land Act of 1881 was passed.

Relation of Landlord and Tenant essential to Right to have Fair Rent fixed or to Purchase under Land Purchase Acts.—The statutes entitling tenants to have fair rents fixed, and to purchase holdings with the aid of advances of public money, are applicable only to persons standing to one another in the relation of landlord and tenant. "Holding" is defined by the fifty-seventh section of the Land Act of 1881 as meaning "during the continuance of a tenancy, a parcel of land held by a tenant of a landlord for the same term and under the same contract of tenancy, and, upon the determination of such tenancy, the same parcel of land discharged from the tenancy." (See *Kelly* v. *Ratley*, [1894] 2 Ir. R. 232 n.)

In the case of fee-farm grants made before the date when the Landlord and Tenant Act, 1860, came into operation (Jan. 1, 1861) a difficulty formerly arose. As a general rule it was held that these did not create that relation, as no reversion was reserved to the grantor. The 14th section of the Land Act of 1896 (*c*) removes the difficulty by providing that a lessee or grantee shall be entitled to apply under the Act, notwithstanding that the instrument under which he holds, though purporting to create the relation of landlord

(*a*) Section 3.
(*b*) 15 Ir. L. T. R. 72.
(*c*) 59 & 60 Vict., c. 47.

and tenant, is dated before Jan. 1, 1861, and by reason of its date does not create the relation. But the grant, whenever made, must purport to create the relation of landlord and tenant.

Conacre.—"The dealing called conacre in this country is a very peculiar one. The person who takes the conacre has no absolute right to the crop. He has not a right to take the crop with merely an obligation to pay for it as a debt. But the person who allows the land to be tilled retains the dominion over the crop by holding it until the stipulated amount shall have been paid. He can prevent the conacre holder from removing the crop from the ground before payment. This involves the right to keep possession of the ground, without which he could not exercise the right of detaining the crop until he is paid for it": *Booth* v. *M'Manus*, per Pigot; C.B. (*a*). The owner of the land retains the occupation of the premises, the conacre holder having a licence to till the land and a right connected with that licence of egress and regress for the purpose of so tilling. "There is not any exclusive right to the party in the conacre holding. From the time of the contract until the planting of the crop begins the possession remains with the landlord, and from that time, although a special possession for a particular purpose is with the conacre holder, the general possession remains with the landlord. . . . Such a contract is not a demise of the land, but a sale of a profit to be derived from the land—a temporary easement—and not an estate in the land; and this view coincides with the doctrine laid down in Co. Litt. 10b, where we find it is said that a grant of *vesturam terræ* does not pass the land; the grantee has only a particular right in the land . . . conacre dealing not creating a tenancy, but being only a mode of farming the land": *Dease* v. *O'Reilly* (*b*).

Grazing Lettings.—Where the owner of land takes cattle of another to graze, the owner retaining possession of

(*a*) 12 Ir. C. L. R. 435-6.
(*b*) 8 Ir. L. R. 59.

the land, this does not create any tenancy. The right of grazing is merely in the nature of a *profit à prendre.* Under this system large numbers of grazing farms are "let" under what are called eleven months' takes, and because in such cases of agistment, as it is called, and in cases of conacre, no tenancy is created such contracts do not amount to sub-lettings.

CHAPTER II.

LEASES AND TENANCIES FROM YEAR TO YEAR.

Lease by Deed or Note in Writing—Tenancy from Year to Year—Implied Covenants—Modes of Enforcing Payment of Rent—Fixtures.

THE lettings of land in Ireland may now, for practical purposes, be divided into two classes—leases and yearly tenancies.

(1) In the case of a lease the landlord, by a deed (*a*), granted the land to the tenant—the lessee—either for lives or for years, subject to the payment of a rent agreed upon, and the tenant covenanted to pay the rent and to do or forbear to do such other acts as had been agreed upon between the parties. The lease generally contained a proviso for re-entry by the lessor in the event of the violation of any of the covenants by the lessee, and in this way the lease would be determined. Leases for lives sometimes contained covenants for perpetual renewal (*b*).

(2) As regards yearly tenancies, the letting was for an indefinite term of years, commencing at a fixed date and terminable by notice to quit (*c*).

Tenancy from Year to Year.—"A tenant under a tenancy from year to year created by express contract holds for one year certain in the first instance, and if at the

(*a*) The word "lease" in Deasy's Act is defined (section 1): any instrument in writing, *whether under seal or not*, containing a contract of tenancy. An important difference might, under the Statute of Limitations, depend on whether a lease was made by deed or not, for where a lease is under seal twenty years' arrears of rent may be recovered, whereas if the tenancy is created by writing not under seal, or by parol, only six years' arrears of rent are recoverable.

(*b*) See Chapter III., p. 16.

(*c*) See Chapter X., p. 72.

end of the year the lessor and lessee mutually will (as in the absence of six months' previous notice in writing they will be presumed to will) that the tenancy shall not determine. then the next year is added to and becomes part of the one term held under the original contract; and in the same manner, each year until the original tenancy is determined, an estate for the new year entered upon springs out of the original contract and becomes parcel of the term: *Wright* v. *Tracey*, per Palles, C.B. (*a*).

A tenancy from year to year may be implied from the conduct of the parties where there is no express contract, and the nature and incidents of such a tenancy will be practically the same as where it is created by express words.

In the case of a letting which did not specify the term for which the land was held, the English courts had to decide what term was to be implied in the contract or to be inferred from the fact that the tenant was found in occupation paying rent to the owner. That question was solved by the assumption that the letting was similar to that ordinarily in use. In later times such a letting was on this ground held to be a tenancy from year to year. As a general rule, upon proof of payment of rent in respect of the occupation of premises, the law will imply that the party making such payments held as yearly tenant under that rent; but it is competent for either party to rebut that implication by proving the circumstances under which such payments were made: *Hurley* v. *Hanrahan* (*b*).

The tenant, apart from express agreement, was bound (1) to pay the rent reserved; (2) he was prohibited from committing waste—that is, destroying the subject-matter by pulling down buildings, &c.; (3) he was bound to give up possession on the determination of the letting, but he was not bound to keep in repair nor even to give up the premises in as good a condition as he had received them.

(*a*) Ir. R. 8 C. L. 493.
(*b*) Ir. R. 1 C. L. 715.

The tenant was entitled, like any other owner of an interest in land, to sell or sublet it to whom and upon what terms he pleased; but he could convey no more than he himself had; and the landlord might put him out by a notice to quit for any reason he chose. The tenant who held the land for a period of uncertain duration had a right to take out the annual crop upon the termination of his term and to return to the land for the purpose of removing it. This common law right was technically termed the right to emblements.

Implied Covenants.—In every lease (unless otherwise expressly provided) there are to be implied on the part of the landlord (sections 40 and 41 of Deasy's Act) covenants for good title to make the lease and quiet enjoyment by the tenant without interruption by any person, and by it the tenant covenants to pay the rent and taxes and to give up quiet possession of the premises in good and substantial repair and condition on the determination of the lease. Where there is an express covenant either for title or quiet enjoyment then there is no implied covenant at all. But this implied covenant for quiet enjoyment in a letting from year to year does not extend to a statutory term if a tenant gets a fair rent fixed under the Act of 1881: *Kearns* v. *Oliver* (*a*).

Three Modes of Enforcing payment of Rent.—(1) The first remedy was a personal action against the tenant founded upon his express contract to pay the rent agreed upon, or upon the implied contract arising from his occupation. He had promised to pay rent, and could be sued on that contract. If one lets a man into occupation, and there is no definite promise, then the law implies a promise on his part to pay a fair value for the use and occupation of the land—the value of the land multiplied by the duration of the occupation. He has impliedly agreed to pay a fair value. So that where there is no express agreement the

(*a*) 24 L. R. Ir. 473.

occupier may be sued, not for rent but for "use and occupation."

(2) The second remedy is one which was formerly considered the chief remedy—namely, distress. For a long period English law regarded the proceeding of distress as the ordinary mode of compelling payment of rent. Distress was originally used to enforce the performance of feudal obligations, not the payment of money—*e.g.*, the obligation of furnishing a certain number of men to the lord. But when the process of distress was applied to the recovery of a money-rent the right of the landlord was extended to selling the goods seized and retaining the arrears out of the proceeds. This remedy, in which the landlord was allowed, as it were, to take the law in his own hands to enforce his right, is surrounded by many technicalities, failure to comply with which renders the proceedings illegal *ab initio*, and it is, consequently, but seldom resorted to.

(3) The third remedy by which payment of rent was enforced is the action of ejectment (*a*), or, as it is now called, an action for the recovery of land. This action, which is to recover possession of the land, could originally only be brought for non-payment of rent, when the letting was by a lease which contained a clause allowing the landlord to re-enter and avoid the lease upon the non-fulfilment by the tenant of his covenant to pay the rent. The right to recover possession depended not upon the non-payment of rent but upon the determination of the letting. Courts of Equity regarded the proviso for re-entry and forfeiture as merely a mode for securing the payment of the rent, and if, therefore, a tenant within a reasonable time—six months—paid the arrears of rent he could have instituted proceedings in Chancery to redeem his interest, and upon settlement of the account between him and his landlord the forfeited lease was reinstated and the tenant put back into possession, so that the right to redeem was originally created by doctrine of Courts of Equity.

(*a*) See Chapter IX., p. 63.

Fixtures.— Upon the natural determination of the letting the tenant gave up the land as it stood, and the landlord took it up as it stood. By the common law, if a tenant had affixed anything to the freehold, he could not remove it without the consent of the landlord (*a*). An exception to this rule was made in relation to trade fixtures, and this was subsequently extended to agricultural fixtures.

The previous law as to fixtures was altered by section 17 of Deasy's Act, which enacted that all personal chattels, engines, machinery, and buildings accessorial thereto, erected and affixed to the freehold by the tenant at his own expense, and so attached to the freehold that they can be removed without substantial injury to the freehold or to the fixture itself, and not erected in pursuance of any obligation or in violation of any agreement, may be removed by the tenant or his executors. This section only applies where the matter is not otherwise specially provided for in the contract of tenancy: *Cosby* v. *Shaw* (*b*).

A tenant is entitled to compensation for suitable improvements in the case of agricultural holdings under the Act of 1870, s. 4; and town tenants are also entitled to compensation under the Town Tenants (Ireland) Act, 1906 (*c*) (6 Edw. VII., c. 54), so that the rights of tenants in relation to fixtures at common law are now of comparatively small importance.

(*a*) Co. Litt. 53a.
(*b*) 19 L. R. Ir. 307; 23 L. R. Ir. 181.
(*c*) See Chapter IV., p. 44.

CHAPTER III.

RENEWABLE LEASEHOLD CONVERSION ACT.

Leases for Lives—Renewable Leasehold Conversion Act, 1850—Perpetuity Leases made after 1850—Ecclesiastical Leases—Fee-farm Grants.

A LEASE might be made for a term certain for 20, 99, 100 or any number of years, or for an uncertain length of time—*e.g.*, for the life of the lessee or for the life of another, *pur autre vie*, as it was called in Norman French—and such leases might contain a covenant for renewal. A lease for lives of three persons, with a covenant for perpetual renewal upon the payment of a fine upon the fall of each life, was a very common form of lease in Ireland. The 19 & 20 Geo. III., c. 30 (Ir.), known as the Tenantry Act, was passed to prevent the forfeiture of renewable leases through neglect of the tenants to renew, unless when a demand was made by the landlord of the fines for renewal, followed by refusal or neglect to pay on the part of the tenant. As to devolution of an estate *pur autre vie*, see Appendix, p. 130.

In 1850 the Renewable Leasehold Conversion Act (12 & 13 Vict., c. 105) was passed "for converting the renewable leasehold tenure of lands in Ireland into a tenure in fee." It was the intention of the Legislature, says Bewley, J. (*a*), that the leasehold tenure which, prior to the execution of a fee-farm grant, existed between landlord and tenant should be converted into a tenure in fee between the same parties, subject to a perpetual rent. Either the original relation of landlord and tenant is, in such a case, preserved, or a new statutory relation of landlord and tenant created; and the fee-farm rent is either a rent-service, properly so-called, or a rent in the nature of a rent-service.

(*a*) *Kelly* v. *Rattey*, [1894] 2 Ir. R. 229 n.

Perpetual Leases made since 1850 operate as Fee-farm Grants.—The Renewable Leasehold Conversion Act (*a*) in effect declared that all perpetuity leases made after the passing of that Act should, without the necessity of taking out a grant, operate as fee-farm grants, and that all reservations of fines on renewal should be deemed void; but such a lease will not be converted into a grant in fee-farm under this section unless the person making it is at the time "competent to convey an estate of inheritance in fee-simple"; and acquiring the fee afterwards will not be sufficient: *Forde* v. *Brew* (*b*).

The object of the Renewable Leasehold Conversion Act was to give a perpetual estate which was not a common law estate in fee, but was an estate created under the statute which was to remain subject to all covenants and conditions which had bound the previous leasehold estate (*c*).

"There is," says Walker, L.J. (*d*), "in cases of grants under the Renewable Leasehold Conversion Act, a statutory fee-simple created with a statutory reversion to which are legally incident by statute all covenants in the lease not commuted under the statute." But, for the purposes of a sale under the Land Purchase Acts, all covenants, agreements, and conditions in any lease or fee-farm grant prohibiting, restraining or tending to restrain the alienation of any land held thereunder are deemed wholly void and inoperative: Irish Land Act, 1903, s. 70 (*e*).

Ecclesiastical Leases.—Prior to the passing of the Church Temporalities Acts of 3 & 4 Wm. IV., c. 37, and 4 & 5 Wm. IV., c. 90, a bishop of the Established Church of Ireland could make a lease to a tenant of See lands for a term of twenty-one years at the old accustomed rent, and in the case of augmentation lands—*i.e.*, lands granted to certain bishopries

(*a*) 12 & 13 Vict., c. 105.
(*b*) 17 Ir. Ch. 1.
(*c*) *M'Naul's Estate*, [1902] 1 Ir. R. 124.
(*d*) *Ib.* 133.
(*e*) 3 Edw. VII., c. 37.

by the Act of Settlement of Charles II—for three lives, taking in each case whatever fine he could obtain, and he could do this every year, the new lease operating as a surrender of the old. These leases for twenty-one years were customarily renewable; but there was no legal obligation on the bishop to renew, and a young bishop might run his life (as it was expressed) against the existing lease, and when it expired by efflux of time he might let the lands to a trustee for himself, or to any other person, at any rent not less than a moiety of the true value. On the other hand, the tenant was under no obligation to renew, and might abstain from renewing for many years in the hope that when the bishop grew older he might be willing to renew for a less fine than that ordinarily payable. The usual custom, however, was to renew annually, and there grew up an almost uniform method of estimating the annual fine in the See lands—namely, in all dioceses except Armagh it was calculated at one-fifth of the profit rent received by the tenant after deducting the rent paid to the bishop, and in Armagh at one-eighth instead of one-fifth.

By the Church Temporalities Act (3 & 4 Wm. IV., c. 37), all tenants holding immediately from bishops or other ecclesiastical corporations sole in Ireland, or from the Ecclesiastical Commissioners, for terms of twenty-one years, or of three lives, were enabled to purchase a conveyance of a perpetual estate in their lands subject to a fee-farm rent. The rent was to be ascertained by adding together the rent payable under the lease and the average renewal fine, and this rent was subject to variation with the average price of wheat or oats, a standard price of either grain (whichever of the two should be most grown in the district where the lands were situate) being stated in the conveyance.

Bewley, J., states (*a*) the result of the legislation in the Church Temporalities Acts (*b*) to be that the immediate

(*a*) *Hamilton* v. *Casey*, [1894] 2 Ir. R. 236.
(*b*) 3 & 4 Will IV., c. 37; 4 & 5 Will. IV., c. 90; 6 & 7 Will. IV., c. 99.

tenant of See lands was entitled to buy a fee-farm interest at a perpetual but variable rent in the nature of a rent-service and not a rent-charge; and that an inferior tenant was also entitled to buy a fee-farm interest subject, likewise, to a fee-farm rent variable in certain cases, the existing relation of landlord and tenant being preserved or a new statutory relation of landlord and tenant created (*a*).

Fee Farm Grants.—A grant in fee subject to a rent was called a fee-farm grant, but in general fee-farm grants at common law could not by reason of the Statute of Quia Emptores create the relation of landlord and tenant, and, though they were common in Ireland in the 17th and the commencement of the 18th century, they were gradually superseded by leases for lives renewable for ever, which gave landlords more effectual remedies for recovery of rents (*b*).

Though in England all valid tenures in fee-farm must have been created prior to the Statute of Quia Emptores, the same observation cannot be made in reference to Ireland (*c*). Numerous valid fee-farm grants in the strictest sense are to be met with in Ireland, made long subsequent to the time at which the Statute Quia Emptores was extended to this country. Under various Acts of the Irish Parliament, and grants from the Crown, tenures in fee-farm were extensively granted in Ireland, and the Renewable Leasehold Conversion Act, the Landlord and Tenant Act of 1860, and other statutes, have enabled a very large number of other fee-farm grants to be legally made. In all these cases the relation of landlord and tenant is created, and the rent reserved is a rent service (*d*).

(*a*) *Hamilton* v. *Casey*, [1894] 2 Ir. R. 229–230.
(*b*) Edge, Leases, p. 189.
(*c*) Bewley, J., in *Christie* v. *Peacocke*, 30 L. R. Ir. 649.
(*d*) See *Verschoyle* v. *Perkins*, 13 Ir. Eq. R. 72.

CHAPTER IV.

THE LANDLORD AND TENANT ACT, 1870.

The Ulster Tenant-right Custom—The Important Essentials of the Custom—Surrender by Operation of Law—Special Privileges of Ulster Tenant-right Tenants—Compensation for Disturbance—Compensation for Improvements—Distinction between Compensation for Disturbance and for Improvements.

The Ulster Tenant-right Custom.—The principal objects of the Act of 1870 (*a*) were—(1) to obtain for agricultural tenants in Ireland security of tenure, (2) to encourage the making of improvements, and (3) to create a peasant proprietary. Its opening words are these:—"The usages prevalent in the province of Ulster which are known as . . . the Ulster tenant-right custom are hereby declared to be legal." Tenants in Ulster had, and still have, certain rights, benefits, and presumptions made in their favour under local customs which did not prevail in other parts of Ireland. "The origin of the system," says de Moleyns (8th ed., pp. 340–1, ed. Quill & Hamilton), "is usually traced to the settlement of Ulster by James I., following on the confiscations of his predecessors. Large grants of the forfeited estates were then made to the ancestors of many of the present landlords, to corporations, and to wealthy companies. The new proprietors, located among a hostile population, imported for their protection, as tenants and settlers, followers of their own. . . . These settlers, often fosterers or of kin to the owners, improving and reclaiming the land of their own labour and energy, had claims not to be overlooked, and thus the principle of tenant-right is supposed to have originated, extending itself gradually to the whole rural population of Ulster."

(*a*) 33 & 34 Vict., c. 46.

What are the usages referred to in the opening words of the Landlord and Tenant Act, 1870? There is in the Act no definition of the Ulster custom, and the use of the plural in the word "usages" points to the reason of this. The Ulster custom varies not only in different counties but also in different estates in the same county, and cannot, therefore, be defined. "The Ulster tenant-right custom," said Ball, C., in *Lendrum* v. *Deazley* (*a*), "is not uniform; it exists and manifests itself with a variety of usages. Therefore, when a claim founded upon it is made in respect of a particular holding, we must in the first instance ascertain what is the usage applicable to the holding." But there are certain elements essential to the custom. Porter, M.R., in *M'Elroy* v. *Brooke* (*b*), says:—"It seems to me that the **important essentials of the custom** are the right to sell, to have the incoming tenant (if there be no reasonable objection to him) recognised by the landlord, and to have a sum of money paid for the interest and the tenancy transferred. I think if any of these ingredients are absent the essentials of the Ulster tenant-right custom are wanting." In *Graham* v. *Earl of Erne* (*c*), Mr. Blake, County Court Judge of Fermanagh, stated the five leading features of the custom as follows:—

(1) The right or custom in general of yearly tenants, or those deriving through them, to continue in undisturbed possession so long as they act properly as tenants and pay their rents. (2) The correlative right of the landlord periodically to raise the rent so as to give him a just, fair, and full participation in the increased value of land, but not so as to extinguish the tenant's interest by paying a rack-rent. (3) The usage or custom of yearly tenants to sell their interests if they do not wish to continue in possession or if they become unable to pay the rent. (4) The correlative right of the landlord to be consulted and to exercise

(*a*) 4 L. R. Ir. 645.
(*b*) 16 L. R. Ir. 74, 75.
(*c*) Donnell's Reports 405.

a potential voice in the approval or disapproval of the proposed assignee. (5) The liability of the landlord, if taking the land for his own purposes from a tenant, to pay the tenant the fair value of his tenant-right.

The fair rent to be paid by the tenant was fixed, not by open competition but by valuation. The revaluation for the purpose of fixing the rent at the determination of the lease, or any time during a tenancy from year to year, was made by a professional valuator, who valued the farm, having regard to the fair value of the ground exclusive of the tenant's buildings and improvements. The buildings were, as a rule, built by the tenant.

The right of the landlord periodically to increase the rent was, until the passing of the Land Act of 1881, recognised as a legal incident of the custom. Palles, C.B., held that if the new rent demanded had been a fair one (in *Clarke* v. *Rotten*) (*a*) there would have been no breach of the tenant-right, but as the new rent demanded was unfair there had been a breach, and he awarded compensation to the tenant who had been served with a notice to quit to enforce payment of the increased rent demanded—*i.e.*, he gave compensation for disturbance.

The Ulster usages recognised rights, not only as between the landlord and his immediate tenant but as between him and the sub-tenants, upon the expiration of the lease of the middleman. On the determination of a non-occupying middleman's lease the sub-tenants in occupation were received as tenants of the head landlord at fair customary rents. They were allowed a tenant-right interest equal to that usually allowed in the district. Compare with this the rights now given by section 16 of the Act of 1896 to sub-tenants upon the eviction of a middleman's interest. The transfer of a holding under the custom from one tenant to another is effected by surrender, by operation of law (*b*). The outgoing tenant and the incoming

(*a*) 9 Ir. L. T. R. 95.
(*b*) See p. 49, *post*.

tenant met in the landlord's agent's office, and the name of the old tenant was struck out of the landlord's books and the new man's name was put in. This was done with the consent of all three parties. Theoretically—from a scientific point of view—the old tenancy determined and a new tenancy was created between the incoming tenant and the landlord; but the practical business man's point of view was that the new man got what the old man had. Though the transaction between the outgoing tenant and the incoming tenant was called a sale there was not what strictly should be called a sale, nor was there any conveyance to be executed by the old to the new tenant. The process was that the new tenant having been approved of by the landlord or his agent, the sum to be paid was deposited by him with the agent in the office. Thereout was paid in the first instance all rent due by the tenant to the landlord, as well as any other sums properly payable by the outgoing tenant to the landlord; the balance of the purchase-money was paid over to the outgoing tenant, and thereupon the new tenant was substituted as the tenant of the farm instead of the old tenant: *Stevenson* v. *Leitrim* (*a*).

It was necessary for the Act of 1870 to declare the Ulster usages to be legal, because, as Lawson, J., said, "customs have been legalised by this Act which, before it passed, could not have been recognised by the courts as legal customs, because they were inconsistent with the contract and uncertain" (*b*). To give a man who entered into a tenancy from year to year a right to stay on indefinitely as long as he paid his rent would be inconsistent with the contract, one of the conditions of which was that it could be determined by notice to quit. By the common law a valid custom must be so ancient that the memory of man runneth not to the contrary, and legal memory runs back to the commencement of the reign of Richard I. Secondly, a custom to be valid must be continuous, for interruption of the rights defeats

(*a*) 7 Ir. L. T. R. 34.
(*b*) See *Wigglesworth* v. *Dallison*, 1 S. L. C. 545, 11th Ed.

custom. Thirdly, it must be reasonable. Fourthly, it must be certain. The Ulster custom is somewhat analogous to, but different in its nature from, the custom of the country referred to in *Wigglesworth* v. *Dallison* (*a*). Evidence of custom or usage will be received on matters on which the contract is silent, but only when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. The Ulster custom may be, and often is, inconsistent with some of the terms of the tenancy. Thus, in *Stevenson* v. *Leitrim* (*b*), the tenant, prior to 1867, held from year to year, and his holding was subject to the custom, and in 1867, being given notice to quit, he and the landlord executed an agreement of letting from year to year, containing a stringent provision against assignment. It was held by the Court for Land Cases Reserved that the custom was not excluded by the agreement (one of the features of that custom being that he might assign); that the holding remained subject to the custom; and that the tenant, having been evicted upon a notice to quit, was entitled to compensation for the loss of the tenant-right.

There are special privileges attaching to the tenants holding under the Ulster tenant-right custom. The 49th section of the Land Act of 1896 provides that "nothing in this Act contained shall prejudice or affect any right, benefit, or presumption exercised or enjoyed under or by virtue of the Ulster tenant-right custom, or any usage corresponding thereto."

Special Privileges of Ulster Tenant-right Tenants.—Firstly, as regards rights.—The essential characteristic of the Ulster custom is the right to sell. In *Adams* v. *Dunseath* [No. 2] (*c*), Holmes, L.J., said:—"Its essential characteristic is that the tenant on quitting or being evicted from his holding is entitled, subject to restrictions, limitations, and conditions, which vary infinitely, to sell to another the right to succeed him as tenant. There were rules

(*a*) 1 S. L. C. 545, 11th Ed.
(*b*) 7 Ir. L. T. R. 34.
(*c*) [1899] 2 Ir. R. 542.

and usages for the purpose of keeping down the price and reducing competition." On tenant-right estates this right to sell under the custom, as distinguished from a sale under the Act, continues to exist, even though the tenant acquires a statutory term at a fair rent under the Land Acts. Upon breach of a statutory condition, a tenant holding under the Ulster tenant-right custom has also a special privilege over other tenants, for he does not thereby forfeit the benefit of the custom (section 20, sub-section 4, of Act of 1881), though a tenant not so circumstanced loses his right to compensation for disturbance, if compelled to quit his holding during the continuance of a statutory term (Act of 1881, section 13, sub-section 6). The landlord has a right of pre-emption under the Act of 1881, but no right of pre-emption under the Ulster custom.

Secondly, as regards benefits.—The chief benefit which a tenant holding under the Ulster custom enjoyed during his tenancy, even prior to the passing of the Act of 1881, was a right to exemption from rent upon his improvements. "Any landlord insisting on rent in respect of improvements made, not by himself but by the tenants for the time being, whether holding under one continuous tenancy or under distinct successive tenancies transmitted from one tenant to another, has always been dealt with as infringing on the custom by thus demanding what was unreasonable and unfair": *Adams* v. *Dunseath* [No. 1], per Law, C. (*a*). The only improvements made by a tenant not holding under the custom, upon which rent can now be allowed in fixing a fair rent, are improvements other than permanent buildings and reclamation of waste land made prior to 1850 (section 1, sub-section 7, of Act of 1896); and it is therefore only in respect of these last improvements that the tenant holding under the Ulster tenant-right custom has any advantage over other tenants. Under special usages improvements made in pursuance of the covenants in his lease may be exempted from rent.

(*a*) 10 L. R. Ir. 118.

Subject to these qualifications, and in the absence of evidence of particular customs affecting the amount of rent to be fixed, the methods of the Land Commission in estimating the fair rent do not vary as between tenancies subject to the custom and those not subject to it.

Thirdly, as regards presumptions.—In case of holdings subject to the Ulster custom a general unrestricted presumption of fact that the improvements of all kinds were made by the tenant has, as a rule, been applied by the Land Commission in fixing fair rents. In the case of ordinary tenants, section 5 of the Act of 1870, as amended by section 1 of the Act of 1896, sub-section 10, applies, and in the absence of direct evidence the court presumes that they were made by the tenant, except—(1) Where they were made before the holding was conveyed on actual sale to the landlord, provided that took place before 1870; (2) where they were made twenty years before the Act of 1870; (3) where it was the practice of the estate for the landlord to make the improvements; (4) where the entire circumstances satisfy the court that the improvements were *not* made by the tenant.

The Act of 1870 merely gave legal sanction to, and enforced the Ulster custom against, the landlords' estates, which were subject to it. But the tenants of those estates, though secured the benefit of the custom, are not bound to hold under it, for any such tenant could abandon his right under the custom and claim the rights given to all tenants by the statute (sections 3 and 4).

Compensation for Improvements and for Disturbance.—The Act of 1870 (section 71) provides that "this Act shall not apply to any holding which is not agricultural or pastoral in its character, or partly agricultural and partly pastoral." It is at this point that legislation applicable to a house in town diverges from that applicable to a farm in the country (*a*).

(*a*) But see now Town Tenants Act, 1906, p. 44, *post*.

Two principal rights were given to tenants by the Act of 1870—one is compensation for disturbance (section 3); the other, compensation for improvements (section 4).

Compensation for Disturbance.—This Act did not avowedly interfere with the landlord's right to evict his tenant; but where the landlord disturbed the tenant, the tenant acquired a right to refuse to give up possession without compensation. Section 3 says that any tenant from year to year of any holding created after the passing of the Act, or under a lease for less than a term of thirty-one years, or for a life or lives, and where the annual value of the holding does not exceed £100, if disturbed in his holding by the act of the landlord is entitled to compensation fixed upon a definite scale. Where the disturbance takes place subsequently to the year 1881, the scale applicable is to be found in section 6 of that Act. Compensation under the scale fixed by section 3 of the Act of 1870, which still applies in some cases, was fixed by reference to the *valuation* of the holding. The less the value of the holding the larger proportionately the compensation the tenant got. The scale fixed under the Act of 1881 is fixed on a scale of *rent*. Under each statute the maximum compensation that may be awarded is measured in so many years' rent. The number of years of rent allowed decreases as the valuation of the holding increases. Out of this compensation for disturbance a deduction is to be made for arrears of rent due, and also damages for any deterioration of the holding arising from non-observance by the tenant of any express or implied covenants or agreements.

By section 9 of the Act of 1870 ejectment for non-payment of rent, or for breach of any condition against assignment, subletting, bankruptcy, or insolvency, is not deemed a disturbance of the tenant by the Act of the landlord. In such a case the tenant shall, the Act says, "stand in the same position in all respects as if he were quitting his holding voluntarily."

The Act of 1870 expressly excludes from the benefit of the sections giving compensation for disturbance all lettings of houses and lands taken for residential and not for farming purposes, also demesne lands, "town parks," and lettings for temporary convenience. These same exceptions run through the Act of 1881. "Town parks" are lands which, being situated near a town, are used in connection with a holding near the town. But holders of demesne lands, town parks, and pasture lettings can claim compensation for improvements (section 15, sub-section 1).

The County Courts are given jurisdiction with reference to fixing this compensation, but it is now usually ascertained by the Land Commission and not by the County Court (*a*.) The number of claims for compensation has greatly diminished, because the tenant who has had a fair rent fixed is not liable to notice to quit his holding, except for a breach of a statutory condition (section 5 of Act of 1881); and in that case he is not entitled to compensation for disturbance (section 13, sub-section 6 of Act of 1881). In the case of a tenancy created since Jan. 1, 1883, a future tenant who does not accept an increase of rent when the landlord demands it, and is compelled to quit, can apparently claim compensation for disturbance (section 4, sub-section 3, of Act of 1881).

Compensation for Improvements. — Section 4 deals with compensation for improvements, which it defines in section 70, sub-section 1, to mean (1) "any work which, being executed, adds to the letting value of the holding . . . and is suitable to such holding," and (2) "tillages, manures, or other like farming works, the benefit of which is unexhausted at the time of the tenant quitting his holding." Any tenant on quitting his holding may claim compensation in respect of all improvements on his holding made by himself or his predecessors-in-title, subject to the following exceptions:—(1) Improvements made twenty years before the claim other than permanent buildings and reclamation

(*a*) See section 37, sub-section 3, Land Act, 1881.

of waste land; (2) improvements prohibited by the landlord in writing as diminishing the general value of his property, and appearing to the court to be likely to tend to diminish the value of the property of the landlord; (3) improvements executed in *pursuance* of a contract for valuable consideration (for if he has made improvements in pursuance of a contract he has got what he has bargained for); (4) improvements made in *contravention* of a contract; (5) improvements which the landlord has undertaken to make, except where there is neglect or delay on landlord's part. Another class of improvements, compensation for which is expressly excluded, is where such compensation is expressly excluded by the terms of a lease made before the Act (sub-section 2); and a tenant under a lease for thirty-one years can claim compensation only for permanent buildings and unexhausted manures and reclamation of waste lands (sub-section 3). By section 4 a tenant who has quitted voluntarily where he has been given permission by the landlord to dispose of improvements to the incoming tenant upon reasonable terms, and has refused or neglected to do so, is not entitled to compensation under the Act.

Section 4, sub-section 5, provides that out of moneys payable to the tenant the landlord may deduct sums for rent or deterioration.

Distinction between Compensation for Disturbance and Compensation for Improvements.—FitzGibbon, L.J., in *O'Donovan* v. *Kenmare* (*a*), explains the distinction between the nature and foundation of the claim to compensation for disturbance and that to compensation for improvements. "I hold," he says, "that any tenant who occupies a holding within the Act of 1870, and who executes improvements upon it, thereby acquires (subject to the statutory limitations) a right to claim compensation for those improvements on 'quitting his holding.'" This quitting may be voluntary or involuntary; it may be due to the act

(*a*) [1896] 2 Ir. R. 529.

of the tenant or to the act of the landlord, but, however it is brought about, it transfers to the landlord the holding increased in value by the improvements which the tenant has made upon the faith of his statutory right to be compensated for them whenever he quits them. This right is absolutely independent of any act of the landlord." "Compensation for disturbance (*a*) arises in the words of the Act of 1870 from the fact that the tenant is disturbed in his holding by the act of the landlord," and the Lord Justice points out that "compensation for disturbance under the Act of 1870 was limited to 'the loss which the Court shall find to be sustained by the tenant by reason of quitting his holding.'"

The right of a tenant to compensation for improvements depends not upon the fact of the expenditure of money but upon the result of the expenditure. Does the improvement add to the letting value of the holding as an agricultural farm? This is the test which the Act itself imposes. In so far as the property at the termination of the letting is worth more for the purpose of its occupation by reason of the expenditure of the tenant's money, and by reason of its increased value, the tenant is entitled to compensation.

By the Act of 1870, where compensation is not claimed under the Ulster tenant-right custom, all improvements upon the holding are, until the contrary is proved, deemed to have been made by the tenant; and where there is no presumption of law in favour of the tenant under this section there may yet be a presumption of fact so as to establish his claim without direct proof—for instance, where buildings appear, from their age, not to have been erected before the commencement of the tenancy, the Court may presume that they were erected by the tenant.

Sub-section 5 of section 4 provides that any contract between a landlord and a tenant, whereby a tenant is prohibited from making such improvements as may be required for the occupation of his holding, and its cultivation, shall be void

(*a*) [1896] 2 Ir. R. 526.

both at law and in equity. The Act also provides that any contract made by the tenant which deprives him of the right to make any claim under section 4 for improvements shall be void.

Section 12, however, enabled a tenant, the aggregate of whose holdings was not less in annual value than £50, to contract not to make any claim for compensation for improvements under any provision of the Act; but that limit has been extended by section 22 of the Act of 1881 to £150.

CHAPTER V.

THE LAND ACTS OF 1881, 1887 AND 1896, AND REDEMPTION OF RENT ACT, 1891.

The Acts of 1860, 1870 and 1881 to be construed together—Holdings excepted from the Land Acts—Contracting out—Tenant must be in Occupation—Leaseholders and Fee-farm Grantees—Present and Future Tenancies—Tenant's Right of Sale—Landlord's Right of Pre-emption—Limitations on Right of Sale—Judicial or Fair Rent—Essential Ingredients in—Effects of fixing Fair Rent—Fixity of Tenure—Landlord's Right of Resumption—How Statutory Term may be created—Statutory Conditions—Remedies for Breach of—Sub-tenant and Middleman.

The Land Act of 1881 and the Landlord and Tenant Act, 1870, are to be construed together as one Act (*a*); and though there is no provision that it is to be construed with the Landlord and Tenant Act, 1860, it has been laid down by Palles, C.B. (*b*), that as the Acts of 1860, 1870 and 1881 are all *in pari materia* "all three must be construed together as one harmonious whole." So that "words which in the former Acts must be interpreted in any particular sense, unless there is something to the contrary in the subject-matter to which they are applied by the latter Acts, or in the context in which they are found, ought to be construed in these latter Acts in the same sense" (*c*).

The Legislature, by the Act of 1870, gave to all agricultural tenants the rights of compensation for disturbance and compensation for improvements, and gave tenants holding under the Ulster tenant-right custom the alternative of claiming under the custom or under that Act. But what the Irish

(*a*) L. A., 1881, s. 57.
(*b*) *Ireland* v. *Landy*, 22 L. R. Ir. 403.
(*c*) *Ib.* 421.

tenants wanted was not compensation for disturbance and for improvements, but not to be liable to be disturbed at all so long as they paid reasonable rents. To obtain the "three fs"—fixity of tenure, free sale and fair rents—was their desire.

The main Acts dealing with the rights of tenants to have judicial rents fixed are the Acts of 1881, 1887, and 1896, and the Redemption of Rent Act, 1891.

The Act of 1881 divides tenancies into present tenancies, future tenancies, existing leaseholds—which, subject to certain conditions, become at their expiration automatically transmuted into present tenancies—and a fourth class of tenancies, expressly excepted by the Act: *Cope* v. *Gabbett* (*a*).

Holding Excepted from Land Law Acts.—The large exceptions from the Land Law Acts are non-agricultural holdings, demesne lands, pasture lettings, town parks, lettings for temporary convenience. These exceptions are set forth in section 58 of the Act of 1881, and modified somewhat by section 5 of the Act of 1896.

Contracting out of Act.—A tenant, the aggregate annual value of whose holdings is not less than £150, may contract himself out of the benefits of the Act of 1881. Section 22 provides that any provision contained in any lease or contract of tenancy or other contract made after the passing of the Act, which provision is inconsistent with any of the foregoing provisions of the Act or with any of the provisions of the Landlord and Tenant Act, 1870, shall be void. If the tenant's valuation is over £150, and the parties desire to exclude the provisions of the Act, it is not necessary that they should state in so many words that this is their intention. When the contract is inconsistent with the terms of the Act, it will be held to exclude those provisions with which it is inconsistent.

A fundamental principle underlying all the Land Acts, from the Act of 1870, is that **the tenant in occupation**

(*a*) [1904] 2 Ir. R. 261.

is the person whose interests are to be secured and safeguarded. The creation of any new middle interest was to be discouraged.

Fixing of Fair Rent on tenancy from year to year.—The Act of 1881 (by sections 4 and 8) enabled the tenant of a present tenancy to have a fair rent fixed by the Court, for the statutory term of 15 years, subject to the statutory conditions contained in section 5.

The Land Act of 1881 gave to the agricultural tenants in the other three provinces, as well as to those in Ulster, rights and privileges very similar to those enjoyed by tenants under the Ulster tenant-right custom. It applied to tenants unless the holdings were especially excepted. Holdings under leases which were in existence at the date of the passing of the Act (22nd August, 1881) were, by section 21, during the currency of the leases, to be regulated by the provisions in such leases, and not by the provisions contained in the Act. But section 21 went on to say that at the expiration of such leases, or such of them as expire in or before 1941, the lessees shall be deemed to be ordinary tenants from year to year. So that this very large class was, in a qualified way, specially excepted. But this qualified exception was abrogated by the Land Act of 1887. This was done, so far as drafting is concerned, in a characteristically roundabout way. A lessee who, under the Act of 1881, in the future could have availed himself of that Act when his lease expired, is, under the Land Act of 1887 (section 1), on his application to the Court, if *bona fide* in occupation of his holding, deemed to be a tenant of a present tenancy as if his lease had expired.

The Act of 1887 enabled Leaseholders to have Fair Rents Fixed.—The Act of 1887 antedated the expiration of the leases which were in existence when the Act of 1881 passed. It said in effect: "You need not wait till your lease expires, but you can come in at once and get a fair rent fixed."

Once a fair rent has been fixed the status of the lessee is altered. He is deemed to be a tenant from year to year, and any covenant against alienation in his lease is wiped out, being inconsistent with the section of the Act of 1881, which then becomes applicable : *Wright & Tittle's Contract* (*a*).

Long Leaseholds and Fee-farm Grants.—The Redemption of Rent Act, 1891, provided for the redemption of the rent by long leaseholders (*i.e.*, where the lease does not expire within ninety-nine years from 1881), and persons holding under fee-farm grants. In such a case, if the owner of the rent refuses to be redeemed, then the lessee or grantee is enabled to have a fair rent fixed if the holding is otherwise within the provisions of the Acts.

Present and Future Tenancies.— A present tenancy is defined by section 57 as a tenancy subsisting at the time of the passing of this Act (August, 1881), or created before 1st January, 1883, in a holding in which a tenancy was subsisting at the time of the passing of the Act. A tenancy is deemed to be a present tenancy until the contrary is proved. A future tenancy is (except as aforesaid) one commencing after the Act (*b*).

"The object of the Act of 1881 was to bestow on every capable present tenant three rights," says Gibson, J., *Cope* v. *Gabbett* (*c*)—"the right to free sale which, where not excluded by valid contract, exists independently of any fair rent order; the right to fair rent, and the right to fixity of tenure, both of which latter rights originate in a fair rent order or agreement."

Tenant's Right of Free Sale.— By section 1 the Act gave to the tenants for the time being of every holding, not specially excepted, the right of free sale of their tenancies, subject to the right of pre-emption in the landlord, and subject also to the landlord's right to object to the purchaser on reasonable grounds.

(*a*) 29 L. R. Ir. 111.

(*b*) See, as to treating a tenancy as a "present" tenancy by consent, secs. 17 and 18 of the Act of 1896.

(*c*) [1904] 2 Ir. R. 241.

Right of Landlord to object to Purchaser.—When the Legislature gave not only the right of free sale, but also fixity of tenure to tenants in *bona fide* occupation of their holdings, it became necessary to guard against undesirable persons being forced upon the landlord by an outgoing tenant, and this was done by giving the landlord the right upon reasonable grounds to object to the purchaser of the tenant's interest. Landlords of holding subject to the Ulster custom also had, under the custom, the right to refuse to accept an undesirable tenant. Where a sale is being made under the Act of 1881 a notice must be given to the landlord by the tenant of his intention to sell within a certain time, thereby giving to the landlord an opportunity of saying whether he is himself going to buy or not. The landlord is then given a right to purchase the tenancy at a price to be fixed by the Court in the event of disagreement (section 1, sub-section 3).

Apart from the Act, there is no restriction on the tenant's right to alienate, except in the case of leases prohibiting alienation or leases executed between 1st June, 1826, and 1st May, 1832; see 7 Geo. IV., c. 29 (*a*). Tenants from year to year frequently held under agreements containing clauses against assignment. Section 1 enables occupying tenants who are tenants for the purpose of the Land Acts to sell even if they hold under agreements prohibiting assignment. This provision applies both to future and present tenancies, so that a future tenant, though he cannot have a fair rent fixed, may, nevertheless, sell his interest. This right of sale attaches without any order fixing the rent having been made.

Limitation on Right of Sale.—There are certain conditions and restrictions limiting the right of sale. Except with the consent of the landlord the sale shall be made to one person only. Sub-division against the will of the landlord is not allowed. Secondly, the tenant must give notice to the landlord of his intention to sell. Again, where the

(*a*) See p. 47, *post*.

tenant agrees to sell to a purchaser, he must by another notice give the name and state the consideration agreed to be given, because the solvency of a proposed purchaser is a matter of obvious importance to the landlord. The landlord may refuse, on reasonable grounds, to accept the purchaser as tenant, and, in case of dispute, the reasonableness of the landlord's refusal is to be decided by the Court.

The Land Commission may, if the just interests of the landlord so require, declare any sale made without the knowledge of the landlord to be void: section 1, sub-section 5.

In advising on a title to a tenancy which has been previously sold under this section, evidence should always be required that notice of that sale had been given to the landlord, and that he consented to accept the then purchaser as tenant.

Sub-section 12 provides that the tenant of a holding, subject to the Ulster tenant-right custom, may sell his tenancy either in pursuance of the custom or in pursuance of this section.

The landlord has, under the Ulster tenant-right custom, no right of pre-emption such as this section gives when the sale is made pursuant to the section.

Judicial or Fair Rent.—The Land Act, 1881 (sections 41 and 42), created the Irish Land Commission as a tribunal which should fix fair rents as between landlord and tenant. There is no statutory definition of the term "fair rent." The Court is to determine the rent, having regard to the interest of the landlord and tenant respectively and to all the circumstances of the case, holding and district (section 8, sub-section 1). "All the circumstances of the case" do not mean that the Land Commission is to take into account matters purely personal to the tenant. "I think," says Walker, C., "the words mean all the circumstances connected with the tenancy": *Lanyon* v. *Clinton* (*a*). By section 8, sub-section 1, the tenant of any present tenancy to which this Act applies, or the landlord and tenant jointly, or the landlord after demanding an increase of rent which the tenant

(*a*) [1895] 2 Ir. R. 155-6.

declines to accept, may apply to the Court to have a fair rent fixed. Application is made to the Court by filing an originating notice.

The Land Act of 1896 in its 1st section provides what the Court is to do when it fixes a fair rent. It shall ascertain and record in the form of a schedule—

(*a*) The annual sum which should be the fair rent on the assumption that all the improvements were made or acquired by the landlord. [The value of these improvements is afterwards deducted from that fair rent so arrived at where the improvements have in fact been made by the tenant.]

(*b*) The condition as to cultivation.

(*c*) The improvements made by the tenant and the deductions made from the rent on account thereof;

(*d*) The extent, if any, to which the landlord has paid for the improvements;

(*e*) The improvements made or acquired by the landlord; and

(*f*) Such other matters as may be taken into account in fixing the fair rent thereof.

This is popularly known as the "pink" schedule. "The intention of the Legislature was that the Court should, before it determines and as incidental to determining the amount of rent, ascertain the various particulars mentioned in clauses (*a*) to (*f*) of the sub-section, and that the fair rent should be ascertained with regard to such particulars, which are essential ingredients in and the basis of the ascertainment of the fair rent": *Cope* v. *Cunningham*, per Palles, C.B. (*a*).

Meredith, J., has laid down, in the case of *Ripley* v. *M'Naghten* (*b*), that any form of competition which has the effect of unduly inflating the letting value of a holding beyond what would otherwise be its fair rent and value is not to be taken into consideration as a ground for increasing the fair

(*a*) [1897] 2 Ir. R. 471-2.
(*b*) [1899] 2 Ir. R. 452.

rent. On the other hand, the fair rent is not to be fixed without any regard for the rents which industrious and sensible farmers in the neighbourhood are willing to pay for the land (*Queen* v. *Irish Land Commission* (*a*)). FitzGibbon, L.J., in *Gosford* v. *Alexander* (*b*), says :—" If a valuer could ascertain in moneys numbered how much any occupying tenant working the holding with reasonable skill and industry could make out of the farm, and if he took all legitimate considerations and allowances into account, this would be the fair rent ; at least it is as nearly a definition of fair rent as I have yet met."

As regards the **effect of fixing a fair rent.** In the case of *Cope* v. *Gabbett* (*c*), Holmes, L.J., says :—" The fixing of the fair rent changed to some extent the previous contractual relations of landlord and tenant. It undoubtedly altered the rent and imposed upon both what are known as statutory conditions. It also had the effect of striking out of the lease every provision inconsistent with the rights and liabilities which the Act has attached to a statutory term." But, subject to these, all the terms of a contract of tenancy in respect of which a fair rent is fixed, other than the amount of rent, remain and regulate the rights of the parties after as well as before such fair rent has been fixed. The Land Commission have no jurisdiction to alter these terms : *Bruce* v. *Steen*, per Palles, C.B. (*d*).

Fixity of Tenure.—Section 5 of the Act of 1881 gives fixity of tenure, except upon breach of the statutory conditions. This fixity of tenure is, however, subject to the right of the landlord to obtain an order from the Court enabling him to resume possession for some reasonable and sufficient purpose, having relation to the good of the holding or of the estate. For such a purpose the Court may require the tenant to sell his tenancy on terms to be approved by the Court.

(*a*) [1899] 2 Ir. R. 445.
(*b*) [1902] 1 Ir. R. 146.
(*c*) [1904] 2 Ir. R. 265.
(*d*) 14 L. R. Ir. 426.

A Statutory term may be created in five different ways:—

(1) By an agreement for an increased rent in the case of either a present or a future tenancy (Act 1881, section 4, sub-section 1).

(2) By the fixing of a judicial rent by the Court in the case of a present tenancy (section 8, sub-section 1).

(3) By agreement between the parties as to a judicial rent filed in Court (section 8, sub-section 6, and section 17 of the Act of 1896).

(4) By reference to arbitration to fix a judicial rent (section 40, Act, 1881—very seldom resorted to).

(5) By agreement for the reinstatement of a present tenant (at an agreed rent) from whom possession has been taken (section 20, sub-section 2, Act, 1881).

When the rent is fixed by the Court (or, as it may be, by the consent of the parties) for the statutory term of 15 years the tenancy is still a tenancy from year to year to this extent, at all events, that the tenant may surrender. When a fair rent has been fixed the present tenancy is deemed to be a tenancy subject to statutory conditions. The 5th and 8th sections draw clear distinctions between (*a*) the duration of the statutory term itself (which is 15 years), and (*b*) the subsistence of the tenancy on which the statutory term is engrafted. The statutory term continues for a period of 15 years from the prescribed date of the fixing of the judicial rent. The fair or judicial rent runs from the gale day next after the service of the originating notice (Act, 1896, section 3, sub-section 2). A further statutory term shall not commence until the expiration of a preceding statutory term, and an alteration of the judicial rent shall not take place at less intervals than 15 years (Act, 1881, section 8, sub-section 7); but sub-section 17 of the Act of 1896 enables a landlord and tenant to agree to the abridgment of a statutory term, and as to the fair rent and the date and duration of the statutory term.

Section 3, sub-section 1, of the Act of 1896 also provides that at the expiration of a statutory term in a present tenancy the tenancy shall continue a present tenancy subject to the same rent and conditions—including the statutory conditions—as during the statutory term; and an application to fix the rent may be made at any time during the continuance of such tenancy.

Statutory Conditions.—While the statutory term continues several consequences follow from it, some for the benefit of the tenant and others for the benefit of the landlord. The tenant's rent cannot be raised, and he cannot be compelled to quit the holding of which he is tenant except for the breach of some statutory condition.

Section 5 of the Act of 1881 lays down these statutory conditions.

(1) The tenant shall pay his rent at the appointed time.

(2) The tenant shall not commit persistent waste.

(3) The tenant shall not, without the consent of his landlord in writing, sub-divide or sub-let his holding. (Although a tenant may assign his holding, and the Act of 1881 gives him the right of free sale, he has no right to sub-divide or sub-let).

(4) The tenant shall not do any act whereby his tenancy becomes vested in an assignee in bankruptcy.

(5) Sub-section 5 gives the landlord some rights that in a good many instances landlords had previously to the passing of this Act. The landlord or persons authorised by him may enter the holding (making amends for any damage they may do) for mining, quarrying, cutting timber and turf (save such as may be required for the use of the holding), making roads, fences and drains, passing to the seashore, viewing the state of the holding, hunting, shooting, fishing, or taking game; and the tenant shall not persistently obstruct the landlord in the exercise of these rights.

Where a landlord wishes to have sporting rights reserved the practice is to have them reserved in the fair rent order.

(6) Sub-section 6 provides that the tenant shall not, without the consent of the landlord, open any house for the sale of intoxicating liquors.

Remedies are given by the Act to the landlord for the breach of these statutory conditions. In the case of non-payment of rent the landlord may proceed by ejectment for non-payment of rent. Where the condition broken is any other statutory condition, then the landlord may proceed by ejectment founded on notice to quit (section 13, sub-section 3). But the tenant, before the commencement of an ejectment founded on notice to quit, may apply to the Land Commission, and, after the action for ejectment has been commenced, to the Court in which the ejectment has been brought—whether it happens to be the County Court or the High Court—to restrain the landlord from enforcing the notice to quit if adequate satisfaction can be made to the landlord by damages, then the Land Commission or the Court where the ejectment has been brought may award damages and stay the ejectment. Sub-section 6 provides that a tenant compelled to quit in consequence of the breach by him of any statutory condition shall not be entitled to any compensation for disturbance. But he is apparently not disentitled to compensation for improvements.

In addition to the remedy founded on notice to quit for the breach of a statutory condition, the landlord is entitled to proceed by action in the Chancery Division, and the Court will grant relief in a proper case: *Richardson* v. *Murphy* (*a*), where the tenant was enjoined from opening a public-house on the holding. The Vice-Chancellor, in that case, said that the statutory conditions are imported for all purposes into every contract of letting to which the Act applies, precisely in the same manner as if they were so many covenants contained in a deed, and the remedy pointed out by the statute—

(*a*) [1899] 1 Ir. R. 248.

notice to quit—is a cumulative remedy, and was not intended to interfere with (what he held to be) the contract between the parties.

Sub-tenant and Middleman.—The Legislature had to provide not only for the simple case of landlord and tenant, but also for cases where sub-tenancies had been created. At common law every tenant had a right to sublet. But where the middleman holds under a lease which contained a covenant or agreement against subletting, any attempt to sublet without the head landlord's consent is simply null and void: *Jagoe* v. *Harrington* (*a*). The 15th section of the Act of 1881 now provides that where the estate of the middleman is determined during the continuance of any tenancy from year to year, whether subject or not to statutory conditions—that is to say, whether or not a fair rent has been fixed for the sub-tenant—the head landlord is to stand in the relation of immediate landlord to the sub-tenant, and is to have the rights and be subject to the liabilities of the vanished middleman. But this only applies where the subletting is valid. The 12th section of the Act of 1896 makes this provision apply even where the middleman's interest has been determined by ejectment for non-payment of rent.

Where the rent received by a middleman is reduced by the Court to a sum less than the sum he pays to the head landlord, the 8th section of the Act of 1887 enables him to surrender. This he could not have done, where the term of his lease had not expired, without the authority of an Act of Parliament. Upon surrender by the middleman the sub-tenants become direct tenants to the head landlord at the rent and subject to the conditions of their sub-tenancies under the person so surrendering.

(*a*) 10 L. R. Ir. 335.

CHAPTER VI.

TOWN TENANTS.

Town Tenants Act, 1906—Compensation for Improvements—Renewal as alternative to—What Improvements Excluded—Landlord may Execute Proposed Improvements—Compensation for Disturbance—Confined to Premises used for trade or Business—Contract excluding Act how far Valid.]

The Town Tenants (Ireland) Act, 1906 (6 Ed. VII., c. 54), entitled a tenant of a holding to which the Act applies to **compensation for improvements** not to exceed the capitalised value of the addition to the letting value of the holding due to such improvements.

Unless the landlord and tenant agree, the amount is to be determined by the County Court, and in awarding compensation the Court may take into consideration the time during which the tenant may have enjoyed the advantage of the improvements, the rent at which the holding has been held, and any benefits which the tenant has received from his landlord in consideration, expressly or impliedly, of the improvements made. A tenant who is quitting is not entitled to any compensation for improvements where the landlord has made a reasonable offer of a new tenancy, or of the continuation or renewal of the tenancy, with the right of the tenant to dispose of his interest therein.

What Improvements Excluded.—A tenant is not entitled to any compensation for improvements which the landlord has undertaken to make unless he has failed to perform his undertaking; nor for any improvements made in contravention of a written contract not to make the improvement; nor for any improvement made in pursuance

of a contract for valuable consideration; nor for improvements made before the Act, except permanent buildings, unless made within ten years before the date of the claim. A tenant proposing to make improvements must give notice to his landlord, with specification and plan, and if the landlord does not object within three months the tenant may make them. If the landlord objects, the tenant may apply to the Court, and if satisfied that the improvement will add to the letting value, and is reasonable and suitable, and will not diminish the letting value of other property of the same landlord, the Court may sanction them. The landlord, either before or after the decision of the Court, may undertake to execute the improvements himself, and can then charge the tenant 5 per cent. per annum on the outlay, to be recoverable as rent.

These provisions apply where the holdings are houses, shops, and other buildings situate in urban districts, towns or villages, and occupied either for residential or business purposes, or partly for one and partly for the other (section 17). The Act also contains provisions for **Compensation for unreasonable disturbance.** Where a landlord, without good and sufficient cause, terminates or refuses to grant a renewal of a tenancy, or an increased rent is demanded by reason of improvements made at the cost of the tenant for which he has not directly or indirectly received an equivalent from the landlord, and such demand results in the tenant quitting, then the tenant, in addition to compensation for improvements (if any), and *notwithstanding any agreement to the contrary*, is entitled to compensation for loss of goodwill and expense of removal (section 5, sub-section 1). Compensation for disturbance applies only to houses, shops, and other buildings occupied wholly or to a substantial extent for trade or business purposes under tenancies created after the Act from year to year, or under leases for terms of less than thirty-one years, or a life or lives, or under contracts of tenancy existing at the passing

of the Act where the rent is under £100 per annum (section 5, sub-section 2).

Any contract (except one not to make an improvement) whereby a tenant would be deprived of compensation under the Act is void unless the Court is of opinion that it is reasonable and was entered into by the parties without any compulsion (section 9).

CHAPTER VII.

ASSIGNMENT AND SUBLETTING.

Difference between Assignment and Subletting—Statutory Prohibition against Assignment—Liability of Assignee—Notice of Assignment—Implied Indemnity by Assignee.—Assignment by Operation of Law—Covenants against Alienation—Consent to Alienation—Subletting without Consent—Trivial Subletting—Subletting with Consent—Liability of Sub-lessees—Payment of Rent to Assignee of Lessor Evidence of his Title.

Difference between Assignment and Subletting.—The general rule of law is that every person having a legal interest in land may lawfully assign that interest; but this power may be restricted by contract. An assignment passes the whole of the interest of the assignor to the assignee. By a lease the lessor gives an interest less than that which he possesses. In this consists the difference between an assignment and a subletting.

Assignments may be divided into (1) assignments by act of the parties and (2) assignments by operation of law.

An express assignment must be by deed executed or instrument in writing signed by the assignor or his agent thereto lawfully authorised in writing (section 9 of Act of 1860). Covenants and conditions against subletting and against assignments are of constant occurrence in leases. Apart from these express prohibitions by the parties themselves, there were certain **statutory prohibitions against assignment.** By 7 Geo. IV., c. 29, it was provided that after 1st June, 1826, no assignment or sublease was to be valid unless the landlord became a party to the instrument, if in writing; or, if not in writing, gave his written consent, and it was made unlawful for the lessee to devise by will to more

of the Act where the rent is under £100 per annum (section 5, sub-section 2).

Any contract (except one not to make an improvement) whereby a tenant would be deprived of compensation under the Act is void unless the Court is of opinion that it is reasonable and was entered into by the parties without any compulsion (section 9).

CHAPTER VII.

ASSIGNMENT AND SUBLETTING.

Difference between Assignment and Subletting—Statutory Prohibition against Assignment—Liability of Assignee—Notice of Assignment—Implied Indemnity by Assignee.—Assignment by Operation of Law—Covenants against Alienation—Consent to Alienation—Subletting without Consent—Trivial Subletting—Subletting with Consent—Liability of Sub-lessees—Payment of Rent to Assignee of Lessor Evidence of his Title.

Difference between Assignment and Subletting.—The general rule of law is that every person having a legal interest in land may lawfully assign that interest; but this power may be restricted by contract. An assignment passes the whole of the interest of the assignor to the assignee. By a lease the lessor gives an interest less than that which he possesses. In this consists the difference between an assignment and a subletting.

Assignments may be divided into (1) assignments by act of the parties and (2) assignments by operation of law.

An express assignment must be by deed executed or instrument in writing signed by the assignor or his agent thereto lawfully authorised in writing (section 9 of Act of 1860). Covenants and conditions against subletting and against assignments are of constant occurrence in leases. Apart from these express prohibitions by the parties themselves, there were certain **statutory prohibitions against assignment.** By 7 Geo. IV., c. 29, it was provided that after 1st June, 1826, no assignment or sublease was to be valid unless the landlord became a party to the instrument, if in writing; or, if not in writing, gave his written consent, and it was made unlawful for the lessee to devise by will to more

than one person. The effect was to insert into each lease a stringent non-alienation clause. This Act was repealed on 1st May, 1832 (*a*), save as to prior leases and agreements. In advising on title, on the interest of any lessee who derives under a lease made between the above dates, it is important to bear in mind that to make good title the written consent of the landlord to any assignment must have been expressly given.

Liability of Assignee.—An assignee, while he continues such, is liable to the observance of all the covenants and agreements in the original lease which can fairly be said to relate to the demised premises or to the mode of occupying them. As the old lawyers said, he is bound by all the covenants that run with the land. He is liable to the same extent as the original lessee, except as to covenants of a purely personal character between the original lessee and the lessor.

In respect of agreements contained in the contract of letting, sections 12 and 13 of Deasy's Act provide that every assignee of the landlord's interest shall have the same rights against the tenant and his assignee as the original landlord had, and that every assignee of a tenant shall have the same rights as against the landlord as the tenant had. And these assignees of landlord and tenant respectively were considered, not as assignees merely of an estate in the land, but as the assignees of the benefit of the original contract; and thus difficult and abstruse questions as to what contracts did or did not run with the land were obviated, because they were treated as assignees of the contract as well as assignees of the respective estates.

Section 14 provided that "no landlord or tenant, being such by assignment, devise, bequest, or act and operation of law only, shall have the benefit or be liable in respect of the breach of any covenant or contract contained or implied in the lease or other contract or tenancy, otherwise than in respect of such rent as shall have accrued due, and such

(*a*) 2 Will. IV., c. 17.

breaches as shall have occurred or continued subsequent to such assignment, and whilst he shall have continued to be such assignee. That is merely a declaration of the common law.

Notice of Assignment.—No assignment made by any assignee of the estate or interest of any tenant discharges such assignee from his liability to the landlord unless and until notice in writing of the particulars of such assignment shall have been given to the landlord."

There was a common practice by which the owner of an unprofitable lease got rid of his liability by assigning his liability to a pauper. At common law an assignee of a lease was only liable for rent accrued in his own time, and he could defeat the landlord's claim against him for rent by assigning over before the rent accrued, and no notice to the landlord was necessary. The law on this point is discussed in *Powell* v. *Adamson* (*a*).

Implied Indemnity by Asssignee.—There is an implied promise on the part of the assignee to indemnify the lessee against breaches of covenant while he is in possession: *Moule* v. *Garrett* (*b*). It is, nevertheless, usual to insert express covenants by the assignee to indemnify the lessee against the rent and the breach of any covenants of the lease, and these should always be introduced into an assignment.

The original lessee remains liable, in the nature of a surety, as between himself and the assignee, for the performance of the covenants which run with the land: *Humble* v. *Langston* (*c*). But if an assignee of the lessee's interest in possession obtains an order fixing a fair rent, this relieves the original lessee of liability: *Sturges* v. *Ryan* (*d*).

Assignment by act and operation of law, without any deed or note in writing, takes place where there is a parol assignment followed by actual change of possession. (The transfer of a holding under the Ulster tenant-right custom

(*a*) [1895] 2 Ir. R. 61.
(*b*) L. R. 7 Ex. 101, 5 Ex. 132.
(*c*) 7 M. & W. 530.
(*d*) 24 L. R. Ir. 305.

from one tenant to another is in strictness an example of assignment by operation of law.)

Upon the bankruptcy of a tenant any leasehold estate or tenancy from year to year which he possesses remains vested in him unless his assignees elect to take it (*a*). But upon such election all the estate of the bankrupt vests in the assignee by operation of law, but the assignees of the bankrupt are not liable as assignees of the tenancy unless they have done some act which unequivocally indicates to the lessor that they have elected to take the benefit of the lease.

The transmission of a tenant's interest seized by the sheriff under a *fi. fa.* is a transmission by operation of law, though it is effected by a coneveyance from the sheriff: *Kennelly* v. *Enright* (*b*).

The death of the tenant also effects a transfer of the tenancy by operation of law. If the tenancy is for a term of years, or from year to year, it vests at once in his personal representative when raised, who can recover it from any person in possession: *Wallis* v. *Wallis* (*c*).

If the tenant of an agricultural tenancy dies intestate, and leaves no person entitled to his personal estate, the tenancy vests in the landlord (section 3 of Act of 1881).

The law attributes the force of an estoppel to certain acts of notoriety, such as livery of seisin (*i.e.*, delivery of the feudal possession), entry, acceptance of an estate, and the like. On this doctrine the acceptance of a new lease by an existing tenant operates as a surrender in law of the old tenancy. He is precluded by his own act from denying that the old lease is at an end. But there is no surrender by operation of law unless the old tenant gives up possesion to the new tenant at or about the time at which the lease is made. The agreement must be acted upon. "A surrender by

(*a*) See Bankruptcy Act, 1857, 20 & 21 Vict., c. 60, sections 267, 268, 271.
(*b*) 8 L. R. Ir. 33.
(*c*) 12 L. R. Ir. 63.

operation of law," says Brady, C.B., "cannot be properly said to be a surrender except by the construction put by the Court upon the acts of the parties, in order to give to those acts the effect substantially intended by them, and when the Courts see that the act of the parties cannot have any operation, except by holding that surrender has taken place, they hold it to have taken place" : *Lynch* v. *Lynch* (*a*).

Section 20 of the Land Act of 1881, which deals with the determination of tenancies, provides in sub-section 1 that surrender to the landlord of a tenancy for the purpose of acceptance or admission of a tenant, or otherwise by way of transfer to the tenant, shall not be deemed to be a determination of the tenancy. In the absence of this provision the incoming tenant might be precluded from having a fair rent fixed; for if he came in after 1st January, 1883, he would be a future tenant and outside the privileges and rights given by the Act of 1881 to present tenants.

Covenants against Alienation.—A clause against alienation does not operate to prevent transmission of a tenant's interest by operation of law unless there is a special provision to that effect—that is to say, it would not prevent transmission by bankruptcy or by death, nor on a conveyance by the sheriff, of the interest in a lease : *Kennelly* v. *Enright* (*b*).

By section 1 of the Act of 1881, tenants from year to year were given a right to sell subject to a right of pre-emption by the landlord. When the provisions of the Act of 1881 were extended by the Act of 1887 to leaseholds, a question arose as to the position of lessees whose leases contained covenants against alienation. Could they sell? Upon a fair rent being fixed under the Act of 1887, the lessees are deemed to be tenants of present ordinary tenancies from year to year at the rent and subject to the conditions of their leases, so far as such covenants are applicable to tenants from year to year. It was held that the restriction of alienation was

(*a*) 6 Ir. L. R. 138.
(*b*) 8 L. R. Ir. 33.

abrogated, being inconsistent with the right to sell under the Acts of 1881 and 1887 : *Wright and Tittle's Contract* (*a*).

Consent to Alienation.—The 10th section of the Act of 1860 provides that where a lease or agreement prohibits assignment it shall not be lawful to assign the lands or any part thereof contrary to such agreement without the consent in writing of the landlord or his agent thereto lawfully authorised in writing. The consent of the landlord, waving the prohibition against alienation, may be testified by the landlord's being an executing party to the instrument of assignment, or by endorsement or subscription of such instrument. And where the landlord has so consented, the original lessee is released from future liability (sections 10 and 16). There is thus in result a substitution of the assignee for the original lessee.

Subletting without Consent.—The 18th section of Deasy's Act provides that where any lease contained an agreement against sub-letting it shall not be lawful for the tenant to sublet without the express consent in writing of the landlord or his agent thereto lawfully authorised. A subletting contrary to the provisions of that section was void, not merely voidable. As regards agricultural holdings, this has been very much modified by section 11 of Act of 1896, which provides that a sub-tenancy is not to be invalidated by reason of subletting by the middleman, and that the superior landlord shall be deemed to have expressed sufficient consent unless within a reasonable time after knowledge of the subletting he signified his dissent. This section merely estops the middleman from repudiating his own contract, unless his lessor has intimated to him that he must do so. Section 2 of the Act of 1881 provides that a tenant from year to year of a tenancy to which the Act applies shall not, without the consent of the landlord in writing, subdivide his holding or sublet the same or any part thereof. The section applies to all yearly tenancies within the Act, whether

(*a*) 29 L. R. Ir. 111.

present or future. Where a statutory term has been created in a holding—that is to say, where a fair rent has been fixed and the tenant is a tenant of present tenancy—it is a breach of one of the statutory conditions for the tenant to sublet without consent (section 5, sub-section 3). Where a statutory term has not been created, then section 2 makes subletting or subdivision of any tenancy to which the Act applies, without consent, void. A subletting in breach of agreement being void, the person who so sublets can recover possession by ejectment on the title without serving any notice to quit, because there is no tenancy to determine. Rent cannot be recovered from such a sub-tenant, nor will an action for use and occupation lie against him : *O'Kane* v. *Burns* (*a*).

Where a tenant sublets without consent the landlord may determine the tenancy by notice to quit, subject to the power given by section 13 of the Act of 1881 to the Court to restrain further proceedings on the notice to quit upon payment by the tenant for any damage for the breach of the statutory condition.

Illegal subletting deprives the tenant of any right to compensation for disturbance (section 13, sub-section 6).

A very serious result to the tenant who sublets without consent in contravention of the Act is that he is not in *bona fide* occupation of his holding, and, therefore, is not entitled to have a fair rent fixed.

Trivial Subletting.—There are minute provisions in the Act of 1896 dealing with trivial subletting and mitigating this result. Section 7 deems a tenant to be in *bona fide* occupation although he has sublet any dwelling-house on the holding (other than the one in which he resides), or where he has sublet part, but retains not less than seven-eighths of the original holding.

Subletting with Consent.—Where a subletting is made with the landlord's consent the tenant may have a fair rent fixed on the portion of which he continues in possession.

The sub-tenant, too, may in such a case have a fair rent

(*a*) [1897] 2 Ir. R. 591.

fixed against the middleman; and the 8th section of the Act of 1887 enables a middleman, whose sub-tenants' rents have been reduced by the Court to a sum less than the rent which the middleman pays to the landlord, to surrender. The sub-tenants thereupon become tenants of the head landlord (section 8, sub-section 10), subject to the conditions of their sub-tenancies. There is also permitted subletting of small holdings not exceeding half an acre for use of a labourer (section 4 of Act of 1887).

Where a subletting is made with the written consent of the landlord the sub-tenant, by paying his own rent to the middleman, is relieved from any liability for the rent reserved by the original lease (section 19). But the head landlord, where a middleman allows his own rent to fall into arrear, can require the sub-tenant to pay him the rent reserved on the subletting in discharge of the rent reserved by the original lease; and any sub-tenant many pay off arrears of head rent and have credit for such payment as against his own rent (sections 19, 20, 21 of Act of 1860).

Liability of Sub-Lessees.—Sub-lessees are only liable to the covenants in their own sub-leases, and cannot, for want of privity, be sued by the head landlord on the covenants contained in a head lease, though their interest may be liable to eviction if there is a power of re-entry for breach of the covenants in the head lease.

Payment of Rent to Assignee of Lessor Evidence of his Title.—Under section 24 of Deasy's Act, in any action brought by a person claiming as assignee of the original landlord, after proof of the original lease or contract, it is made sufficient *prima facie* evidence of the plaintiff's title that he has for one year at least received the rent from a party in possession. It is also provided that where the person under whom he immediately derives title has, for one year at least, and within three years before the transmission of such title, received the rent from a party in possession, this shall be *prima facie* evidence of the assignee's title.

CHAPTER VIII.

RECOVERY OF RENT.

Distress—Who may Distrain—When Distress may be Made—What may be Destrained—Action for Rent—Who may bring Action for Rent—Who is Liable for Rent—Tenant Estopped from Disputing his Landlord's Title—Defence of Statutes of Limitation—Action for Use and Occupation—Set-off and Counter-claim.

THERE are two ways in which a landlord may recover rent due. One is without the intervention of the Court, by distress; the other is, by bringing a personal action for the rent.

Distress.—Distress is in the nature of a pledge. It was a remedy of the landlord limited to the mere detention of personal property found on the land as a pledge for the payment of the rent due. The original nature of the remedy may still be traced in the fact that, as a pledge, while the goods remained unsold, it suspends the remedy for the recovery by action, although it is not a satisfaction of the rent due.

The power to distrain is incidental to the relation of landlord and tenant, and it attaches to all rents reserved on lettings of corporeal hereditaments by any contract in writing or by parol; that is to say, whenever a contract of tenancy exists creating the relation of landlord and tenant, the person entitled to the rent may distrain for it.

But a landlord cannot distrain for rent for which he has already obtained a judgment: it is in fact no longer rent but a judgment debt—*transit in rem judicatam*. The law treats a judgment as of a higher nature than an ordinary debt, which becomes merged in the judgment.

Who may Distrain.—In all cases the person substantially entitled to the rent may distrain with the authority, express or implied, of the person in whom the immediate legal estate in the reversion is vested. For instance, a mortgagor has implied authority to distrain in the name of the mortgagee. And now under sub-section 5 of section 28 of the Judicature Act, 1877, a mortgagor entitled for the time being to the possession or to the receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof has been given by the mortgagee, may sign and cause to be served notices to quit, determine tenancies or accept surrenders thereof. This special provision is not contained in the English Judicature Act.

"The policy of the Judicature Act," says O'Brien, J., "was that for the prevention of absurd inconveniences, which were constantly presented by cases in court, the beneficial owner of lands should, until actual interference by the mortgagee, be the person directly entitled to enforce all the engagements of the tenancy." Where a tenancy commences before the mortgage, and when the mortgagee gives notice to the tenant, he becomes entitled to and may distrain or sue the tenant for any rent in arrear since the mortgage, and also for that which subsequently accrues. In this way a mortgagee comes into receipt of the rents of lands which are in the hands of tenants.

In the simple case of a mortgagor mortgaging land in his own possession, the way a mortgagee comes into possession, if there are no tenants, is by taking it himself. But if there are tenants the mortgagee requires the tenants to pay the rent directly to him. When the tenancy is created *after* the mortgage without the privity of the mortgagee, the tenant is liable to be ejected by the mortgagee without notice, and he has no remedy except against the mortgagor. On the other hand, a mortgagee cannot distrain or bring an action for rent so long as the relation of landlord and tenant does not subsist between him and the person in possession. If he recognises

him as his own tenant he cannot afterwards treat him as a trespasser, and the effect of the recognition is not to set up a tenancy made by the mortgagor, but to create a new tenancy from year to year between the mortgagee and the person he recognises as his tenant: *Moss* v. *Gallimore* (*a*).

The landlord or his agent may distrain in person or by bailiff. The authority to the bailiff must be in writing, signed by the person substantially and beneficially entitled to the rent or by his agent.

The remedy of distress follows the right to the rent. Executors and administrators taking leasehold estates as assets may distrain for rent due before or after the death of the former owner.

If an execution is levied by a creditor against a tenant, and the sheriff seizes under a *fi. fa.*, the landlord is entitled in lieu of distress to one year's rent out of the proceeds before the goods are removed from the land: *Wren* v. *Stokes* (*b*). In *Davidson* v. *Allen* (*c*), where such a seizure was made, the landlord was held entitled to a years' rent, although a bill had been given for it because a promissory note or a bill given and accepted for rent does not extinguish the claim for rent until it is paid (*d*).

When Distress may be Made.—Rent may be distrained for, without previous demand, on the day after it falls due. The reason of that is that our law deems it the duty of a debtor to find out his creditor and pay him, and not *vice versa*.

Distress must be made during the tenancy or within six months from its termination, and during the occupation of the tenant (or those claiming under him) from whom the rent became due.

Distress must not be made between sunset and sunrise, nor on Sunday; and by section 51 of Deasy's Act it is unlawful

(*a*) 1 Smith, L. C., 11th Ed., 522.
(*b*) [1902] 1 Ir. R. 167.
(*c*) 20 L. R. Ir. 16.
(*d*) See 9 Anne c. 8, s. 1. (Ir.)

for a landlord to take or seize any distress for rent which became due more than one year before the making of such distress.

The distress must be made on the land out of which the rent issues. But if the landlord coming to distrain sees cattle on the demised premises, and the tenant, to prevent distress, drives them away, the landlord may follow and distrain the cattle, though they may then be off the land.

What may be Distrained.—Speaking generally, all cattle and moveable articles on the premises out of which the rent issues, whether they belong to the tenant or to a stranger, may be distrained (*a*).

There are certain exceptions, some absolute and some conditional. Perishable articles, such as fruit or butter, cannot be distrained. Nor are growing crops or goods delivered to a person in the way of his trade subject to distress — for instance, a horse sent to a forge to be shod cannot be distrained for rent due by the smith for the forge. Things in actual use, and fixtures if not removable without damage, are also exceptions. There are some conditional exceptions which cannot be seized if there is other sufficient distress on the premises. Articles of trade or profession, tools, lawyer's books, beasts of the plough and implements of husbandry are instances. Goods already in execution also come under this heading. If a sheriff had seized goods they could not be distrained if there were other distrainable goods available. If any of these things were taken the distress would be illegal. A distress will be illegal if made after actual tender of the rent; and tender of rent and charges before the commencement of the sale of goods, renders the subsequent sale of them illegal. Goods distrained until actually sold under distress remain the property of the person from whom they were taken, and the tenant may therefore dispose of them subject to the distress or, if the distress is abandoned without a sale, he may recover them back.

(*a*) See, however, 8 Ed. VII., c. 53, s. 10.

Action for Rent.—The landlord may bring an action for rent in arrear. Every person entitled to rent in arrear, whether in his own right or as executor or administrator of any party deceased, under any lease or contract of tenancy, whether of freehold or for years or both, and whether the estate or interest in such lease shall be continuing or not, shall be entitled to recover such arrears from the tenant of such land at the time of the accruing of such rent, by action in the High Court, or, where the amount shall not exceed the sum of £100, by civil bill action in the County Court of the county in which the lands are situated (section 45 of Deasy's Act). The limit is twice that controlling the ordinary jurisdiction of the County Court, which is £50.

In earlier Acts dealing with ejectments for non-payment of rent the right to bring the action was confined to cases in which there was no sufficient distress on the lands. In old leases, too, the right to distrain, if the rent be not paid, is often followed by a proviso for re-entry "if no sufficient distress be found on the premises."

Who may bring Action for Rent.—Who may bring the action? Every person entitled. That includes a minor entitled in his own right. The committee of a lunatic's estate can sue in his own name and in that of the lunatic upon a lease made by the lunatic. A mortgagor may sue for rent in his own name, provided the mortgagee has not served notice of his intention to enter into receipt of the rents and profits (section 28, sub-section 5 of the Judicature Act). A mortgagee is also entitled to sue as assignee of the reversion, for rent due under a letting made by the mortgagor before the mortgage, even without serving the tenant with any notice, the bringing of the action being sufficient notice, as regards the rent not previously paid, to the mortgagor: *Laffan* v. *Maguire* (*a*).

A receiver appointed by a mortgagee under the Conveyancing Act, 1881, is entitled to sue in the name either of the

(*a*) 4 L. R. Ir. 412.

mortgagor or of the mortgagee. (*See* section 24, sub-section 3, of that Act).

A receiver under the Court sues in the name of the owner, and need not produce at the trial the order of the judge authorising him to do so.

Who is Liable for Rent.—Who is liable for the rent? If the tenancy is under lease, and the lease contains a covenant to pay the rent, the lessee remains liable during the whole term, even though he is not in possession: *Baynton* v. *Morgan* (*a*). But if the lease contains a covenant against assignment without the consent of the landlord, and he *does* consent, in the way prescribed by section 10 of Deasy's Act, this discharges the lessee from all future liability (section 16). A landlord is entitled to treat a person in possession under a lease as assignee of the lease until the contrary is proved. Thus an executor in possession under a lease—an executor of the lessee—is liable for the rent, and the landlord can sue him in either of two ways: either as executor, as representing the original lessee, or he may treat him as assignee, in which latter case he would be entitled to recover judgment against him *de bonis propriis*: *Fielding* v. *Cronin* (*b*).

Tenant Estopped from disputing his Landlord's Title.—A tenant is estopped from disputing his landlord's title, so that he cannot show that the landlord had no estate or interest at the time of the making of the lease. He may, however, show that his landlord's estate has expired, or that he has conveyed the reversion to another (*c*). And, when the lease under which the tenant took has expired, the man who was formerly tenant, but has ceased to be so, may show that it was a mistake to have taken the lease, and that the land belonged to himself; but during the continuance of the lease he cannot do this: *Clark* v. *Adie* (*d*).

(*a*) 22 Q. B. D. 74.
(*b*) 16 L. R. Ir. 380.
(*c*) See on the question of estoppel by matter *in pais* the Duchess of Kingston's case, 2 Smith's L. C. 831.
(*d*) 2 App. Cas. 423.

Defence of Statutes of Limitation.—As regards the defence of the Statutes of Limitation, rent reserved by a lease under seal is recoverable by action within twenty years: Common Law Procedure Act, 1853, s. 20. The Real Property Limitation Act, 1874 (*a*), which bars a rent after twelve years, deals with a rent-charge, a rent of inheritance, not a rent reserved in a lease, which a tenant has to pay his landlord: see *Donegan* v. *Neill* (*b*). Accruing gales of rent are recoverable, even although more than twenty years have elapsed since the last payment, and apparently twenty years of rent reserved by a lease can be recovered: see *Percèval* v. *Dunne* (*c*). No length of possession without payment of rent will bar the title of the landlord to the land, so long as the term for which the tenant holds has not expired: *Archbold* v. *Scully* (*d*). Where a tenancy is not under seal the rent is only due by simple contract, and is therefore barred after six years.

The remedies of a landlord by action for rent and for possession are distinct—the one results in a judgment for money the other in a judgment for possession. A judgment for rent does not bar the landlord's right to possession of the lands. Conversely ejectment for non-payment of rent does not bar the right to recover the rent due; and a claim for recovery of possession and for payment of rent may be combined in the same action (section 77 of Deasy's Act.)

Action for Use and Occupation.—An action for use and occupation may be brought under the 46th section of Deasy's Act, which enacts what was law before it.

A contract to pay a fair compensation for use and occupation is implied by law from the fact that lands belonging to the plaintiff have been occupied by the defendant by the plaintiff's permission. The amount of compensation in such case depends on the value of the premises and on the duration of the occupation. As soon as the occupation ceases the

(*a*) 37 & 38 Vict., c. 57.
(*b*) 16 L. R. Ir. 309.
(*c*) 9 Ir. C. L. R. 422.
(*d*) 9 H. L. C. 360.

implied contract ceases, and as no express time is limited for payment the compensation accrues due from day to day. An implied contract is, of course, negatived by an express agreement on the same matter, and the amount of rent and time of payment would then be determined by the agreement. The mere fact of the plaintiff's ownership of the land and of the occupation by the defendant is sufficient *prima facie* evidence of a contract to support this action" (*a*). An action for use and occupation is brought where a person is in possession without an agreement as to the rent.

As a defence the defendant may either deny the use and occupation or show that it was not by permission of the plaintiff. The circumstances of the occupation must be such that the law will imply an agreement to pay for it. Thus, if a purchaser enters into possession of land under a contract of sale which is subsequently rescinded, he is not liable in use and occupation during the period between the entry and the rescission, but if after the rescission he remains in possession he is liable in respect of his subsequent occupation. Where the defendant has been treated by the landlord as a trespasser, permission to occupy is negatived, and an action for use and occupation cannot be maintained. The remedy in such a case is to bring an action of ejectment and claim mesne profits (*b*).

Set-off and Counter-claim.—Section 48 of Deasy's Act allowed the tenant in an action against him for recovery of rent to set off any debts due to him by the landlord. This is a section of comparatively little importance since the extended rights of set-off and counter-claim given by the Judicature Act (section 27, sub-section 7) and Order XIX., rule 3, of the Rules of the Supreme Court, 1905.

(*a*) See Bullen & Leake, Prec. Pleading.
(*b*) See *post*, Chapter XI., p. 88.

CHAPTER IX.

EJECTMENT FOR NON-PAYMENT OF RENT.

A Statutory Remedy—A Year's Rent must be Due—Defence to the Action—Right to Redeem—Restitution of Possession—Power of Court to Stay Proceedings—Payment of Rent by Instalments—Caretaker Notice under Act, 1887—Ejectment of Middleman who has Sub-tenants—Limit on Arrears Recoverable in Ejectment.

This subject must be considered (1) in reference to cases *not* within the Land Law Acts—*i.e.*, the Act of 1881 and the subsequent Acts under which fair rents may be fixed—and (2) in reference to cases coming within those Acts.

CASES NOT WITHIN THE LAND LAW ACTS.

The 52nd section of Deasy's Act enables a landlord whenever a year's rent shall be in arrear, whether the lands are held under fee-farm grant, lease, or other contract of tenancy, or from year to year, to proceed by ejectment in a superior court for the recovery of the lands, or (where the yearly rent does not exceed £100) in the County Court of the county in which the lands are situated. An action for ejectment (now called an action for the recovery of land) under this 52nd section does not lie in respect of tenancies less than tenancies from year to year. Judgment in ejectment for non-payment of rent is **a statutory remedy** although based on the common law of entry for condition broken (see judgment of Barry, L.J., in *M'Sheffry* v. *Doherty* (*a*). There is in England no action of ejectment for non-payment of rent.

The tenancy rests upon one undivisible contract, and it cannot be evicted at all unless it is wholly put an end to.

(*a*) [1897] 2 Ir. R. 232.

Just as a tenancy cannot be put an end to in part, so an action will not lie for ejectment from part of the lands comprised in the tenancy. This was decided lately, though it had never been questioned before, in the case of *M'Sheffry* v. *Doherty* (*a*). To sustain the action **there must be a year's rent due** which has issued out of the lands sought to be recovered. The relation of landlord and tenant must exist. The lands must be all the lands comprised in the contract of tenancy.

The plaintiff in an ejectment for non-payment of rent need not be the person in whom the legal estate in the lands is vested, provided he is substantially and beneficially entitled to the rent. A mortgagor may maintain an action in his own name to evict a tenancy created prior to the mortgage. If there is a subsisting contract of tenancy, and one year's rent due, the plaintiff becomes entitled to the thing itself—the land. The only necessary defendant to such an action is the person in actual occupation of the lands as tenant or under-tenant.

In a **statement of claim** in an action of ejectment for non-payment of rent, where the lessor is himself the plaintiff, it is unnecessary to state more than (1) a subsisting lease, (2) that the specified lands are held from the plaintiff under that lease, (3) that a year's rent or upwards is due, and possibly (4) that the defendant is in possession : *Barnes* v. *Barnes*, per Palles, C.B. (*b*). Where the plaintiff is the assignee of the lessor it is generally sufficient to aver that the estate and interest of the lessor has become vested in such assignee, without setting out the devolution of the title to the plaintiff. The fact of devolution must be stated, but the steps in the devolution need not be set out in detail : *Beatty* v. *Leacy* (*c*).

A defendant might be entitled to call on the plaintiff to set out his title, if he was claiming the rent for the first time ;

(*a*) [1897] 2 Ir. R. 191.
(*b*) 8 L. R. Ir. 165.
(*c*) 16 L. R. Ir. 132

or, if after paying it for some time to the plaintiff, some other person made an adverse claim to it.

In cases within the Land Acts this statement of claim must be on the writ of summons—that is to say, the writ must be "specially endorsed."

Defence to the Action.—A form of defence in an action for non-payment of rent is given in the Schedule to the Common Law Procedure Act, 1853. "*G. H.*, one of the defendants and tenant of the lands of Blackacre, says that the rent of the said premises is not in arrear, and that the defendant paid the rent and every part thereof to the plaintiff before the commencement of this action. Particulars of payment—1st June, 1909, by cash paid by the defendant to the plaintiff, £140."

A defence that the defendant is not tenant must deny that there is a subsisting tenancy in any person under the plaintiff. A defence denying that the defendant was tenant to the plaintiff or any other person for the said premises was set aside as embarrassing: *Hildige* v. *O'Farrell* (*a*), followed in *Rowley* v. *Laffan* (*b*). The plea of possession under Order XXI., rule 23, R. S. C., 1905 (*c*), is a bad defence to an action for non-payment of rent. The defendant in an action of ejectment *on the title* may plead "that he is in possession of all the lands and premises," because possession is *prima facie* proof of title, and in that way he puts the plaintiff on proof of his title. But such a plea is not allowable in an action for non-payment of rent, because so long as a tenancy exists, the tenant is estopped from disputing his landlord's title.

Right to Redeem.—The 63rd and 64th sections of the Act of 1860 give the defendant in an ejectment for non-payment of rent, or any other person who has a specific interest in the contract of tenancy (*e.g.*, a mortgagee of it), a right to redeem—that is, to pay the rent and costs instead of going out of possession. This the defendant may do at

(*a*) 8 L. R. Ir. 158.
(*b*) 10 L. R. Ir. 9.
(*c*) Wylie. Jud. Acts, p. 411.

any time before the writ of possession has been executed. If the plaintiff refuses to take the rent and costs the defendant may lodge the amount in Court, then the Court may stay all further proceedings and order the money to be paid to the plaintiff on demand.

The 65th section allows payment at a later stage. It provides that "upon every writ of *habere facias possessionem* and warrant under a decree for possession in any ejectment for non-payment of rent there shall be a statement of the amount of rent then due." The defendant is thus informed how much he has to pay to stop the sheriff taking possession. The writ of possession, which is directed to the sheriff, is the means by which the order of the Court that the land shall be given up to the plaintiff is carried out; it is the authority given to the sheriff. On each of them—that is to say, not only on the judgment of the High Court, but also on the writ of possession, and in a County Court case on the decree and warrant of the County Court—there must be a statement of the amount of the rent due. The purpose of this is apparent from the rest of the section which proceeds "if at any time before execution is executed the defendant shall pay to the sheriff the sum so marked for rent and costs, such sheriff shall stay such execution, and shall endorse on such writ as a return (*a*) thereto the receipt of such rent and costs."

The tenancy is not determined until the writ of *habere* has been executed.

The 66th section provides that the remedy for arrears of rent is not to be prejudiced by recovery of possession. The landlord is entitled, even though he has got back his land, to get the amount due for arrears of rent as well.

(*a*) When any writ is given to the sheriff for execution he must make a "return" on the writ showing how he has carried out the command therein, or the cause why he has not carried it out. In the case of a *fi. fa.*, if the defendant has no goods that can be seized, the return is *nulla bona*. In the case of an *habere facias possessionem* he gives possession to the plaintiff or returns that the defendant has paid the amount of rent and costs.

Restitution of Possession.—Sections 70 and 71 go a step further, and provide for restitution where possession has been taken under judgment or decree. Section 71 enables the Court in which the decree or judgment for possession was obtained, on the application of the defendant or any other person having a specific interest in the lease or contract of tenancy, to award restitution of possession within six months after the execution of the decree or *habere*—that is to say, although possession has been taken, for six months after that the defendant, by paying up the rent, can ask the Court to restore him, and it enables the Court to hear and determine in a summary manner his claim to be restored, and to give such relief therein as a Court of Equity might have done. In sections 65 to 71 of Deasy's Act the Legislature was following in the steps of the Courts of Equity when they relieved against forfeiture. The persons "having a specific interest in the lands or other contract of tenancy" include, in addition to the tenant himself, an assignee of his interest (even though only of part of the premises demised), *Murphy* v. *Davey* (*a*), a sub-tenant, who, however, must, in order to redeem, pay full rent and costs, and not merely his own rent; also persons having an equitable estate or even an equitable lien on the premises comprised in the lease; mortgagees, including judgment mortgagees, are also entitled to redeem. So too may a mortgagee by deposit of title deeds. But a mere judgment creditor who has seized the tenancy under a *fieri facias* is not entitled to redeem except with the landlord's consent: *Warnock* v. *Leslie* (*b*).

Persons having a derivative interest, who redeem a tenancy, are salvage creditors upon it. The advances made by them are a first charge upon the tenant's interest, in priority to incumbrances of an earlier date.

A creditor who has so redeemed a tenancy is entitled to a decree for sale of the tenant's interest in order to raise the amount he has paid, and he may also recover the amount

(*a*) 14 L. R. Ir. 28.
(*b*) 10 L. R. Ir. 72.

in a personal action against the persons primarily liable, as money paid to their use: *Murphy* v. *Davey* (*a*).

The effect of a writ of restitution obtained on the application of any persons entitled to it is to vacate the judgment in ejectment and to set up the lease and all interests derived thereout. When, therefore, the immediate lessee redeems, all the sub-tenancies are restored, even against the will of the sub-tenants: *Lombard* v. *Kennedy* (*b*). Chatterton, V.C., in that case, said:—"The forfeiture incurred (by non payment of rent) does not in reality become absolute until the period for redemption has expired. Up to the expiration of that period the forfeiture is only inchoate, the first steps of judgment and execution only having being taken, and does not become complete until such period has elapsed, without the right to redeem having been exercised. But if, before the expiration of the period allowed by law, any person having a sufficient interest shall redeem, the inchoate forfeiture is thereby rendered incapable of becoming absolute, and the tenancy evicted, and all interests derived thereout, continue as if the judgment had been vacated."

EJECTMENT FOR NON-PAYMENT OF RENT IN CASES WITHIN THE LAND LAW ACTS.

Power of Court to Stay Proceedings.—The Land Act of 1881 enables a landlord, notwithstanding that a fair rent has been fixed and a statutory term therefore created, to evict for non-payment of rent. Payment of the judicial rent at the appointed time is a statutory condition (section 5, sub-section 1). Where proceedings to compel a tenant of a "present tenancy" to quit his holding are taken before or after an application to fix a judicial rent, and are pending before the fair rent application is disposed of, the Court before which such proceedings are pending is given power by section 13, sub-section 3, of the Act of 1881 to postpone the proceedings until the determination

(*a*) 14 L. R. Ir. 28.
(*b*) 21 L. R. Ir. 201, 208.

of the fair rent proceedings on such terms as the Court may direct. In ejectment for non-payment of rent, proceedings may also be stayed under this sub-section, but in such cases orders are usually made only on terms of the tenant making a substantial payment of the rent within a short time. But the fact that proceedings to fix a fair rent are pending is no ground for adjourning an ejectment for non-payment of rent: *Hudson* v. *Murphy* (*a*), per Palles, C.B.

Payment of Rent by Instalments.—The Act of 1887, in section 30, which applies to every holding in which a fair rent has been fixed or can be fixed, where the tenant has a holding the annual valuation of which does not exceed £50, gives power to the Court to stay eviction if satisfied that the tenant is unable to make an immediate payment, and that the inability does not arise from his own conduct, act, or default, and there is reasonable ground for granting an extension of time to pay. The Court may order that the rent and arrears shall be paid in instalments. If default is made in the payment of the first or any subsequent instalment the stay shall be removed. The same section enables the Court to stay execution on foot of *any* judgment against the tenant's interest on a holding under similar circumstances and conditions. But this does not prevent seizure under *fieri facias* of any goods or chattels he may have. The tenant must make a specific application to the Court for the purpose. The affidavit of the tenant, on his application, should set out his reasons for his inability to pay—losses of stock, bad crops, bad prices, or such like—and should give a full statement of his property, like a bankrupt's statement of affairs. He must show, in the words of the section, that the inability to pay "does not arise from the tenant's own conduct, act or default."

Caretaker Notice under Act, 1887.—The 7th section of the Act of 1887 has been called the "eviction-made-easy" section. In the case of agricultural holdings, where the rent does not exceed £100 a year, whether the holding is within

(*a*) 28 Ir. L. T. R. 98.

the Land Acts or not, it substitutes the service of a written notice for execution of a judgment for non-payment of rent. That notice puts an end to the tenancy in the same way as if the tenant had been put out of possession, and turns the tenant into a caretaker. The time to redeem (six months) dates from the service of the notice, as before the section it would have dated from the taking of possession. He may then be removed from possession after demand of possession. In the case of holdings of over £100 rent the landlord, although it is over £100, can avail himself of this section if he chooses.

Ejectment of a Middleman who has Sub-tenants.—The 12th section of the Land Act of 1896 deals with the position of sub-tenants where the head landlord has recovered a judgment in ejectment for non-payment of rent against a middleman. The estate of the middleman is deemed to be determined as if a writ of possession had been executed. Apart from this section a judgment for possession must be followed by taking possession, so as to determine the tenancy previously existing, or now since the section, by service of the equivalent caretaker notice. Sub-section 2 of this section 12 provides that the tenancy of the holding shall not be affected, except that the head landlord shall stand in the relation of immediate landlord to the sub-tenants, and may recover all rent due from the sub-tenant to the middleman, but not rent due from the middleman to him. In *French* v. *Mitchell* (*a*) it was held that, where the head landlord has obtained a judgment in an ejectment for non-payment of rent, he cannot afterwards enforce against the middleman the personal action for rent accrued prior to the judgment in ejectment.

Limit on Arrears recoverable in Ejectment.—Section 16 of the Act of 1896 enables a tenant of a holding to which the Land Law Acts apply, where the rent in arrear exceeds two years' rent, to pay or tender or lodge under sections 60-71 of Deasy's Act two years' rent, and the tenant is thereby placed in the same position under these sections as if two

(*a*) [1904] 2 Ir. R. 182.

years' rent were the sum due for rent up to the date of the commencement of the proceedings in ejectment. The balance of the rent due is recoverable by the landlord as if the sum were a debt due to him by the person legally liable therefor, but is not recoverable by ejectment for non-payment of rent, nor by distress. The remedy *in rem* for all except the last two years' rent is taken away, but the remedy *in personam* is not interfered with by the section.

CHAPTER X.

DETERMINATION OF TENANCY.

Determination by Effluxion of Time—Notice to Quit—Action for Overholding—Agricultural Holdings excluded from Land Acts—Where Fair Rent not Fixed—Where Fair Rent Fixed—Landlord's Right of Resumption—Surrender to be in Writing—Surrender by Middleman—Tenancies Created by Limited Owner.

By reason of the right conferred by the Land Law Acts on tenants of agricultural or pastoral holdings to continue in occupation of them at judicially fixed rents, after the expiration of the terms for which they were originally let, it is necessary to consider the topic of determination of tenancies in two classes depending upon the question whether a holding is or is not within the fair rent provisions of the Land Law Acts. First, then, as regards holdings outside those provisions.

NON-AGRICULTURAL HOLDINGS.

Determination by Effluxion of Time.—A tenancy, if for a fixed term—for instance, a lease for a term of years—will determine by effluxion of time. If a house be let for twenty-one years, as soon as the twenty-one years are up the tenancy comes to an end automatically, and no demand of possession is necessary before commencing an ejectment for overholding.

Section 5 of Deasy's Act provided that if a tenant under a written agreement, after the expiration of his term, continued in possession for a month after demand of possession made by the landlord, such continuance might, at the election of the landlord, be held to create a new tenancy from year to year upon the terms of the previous tenancy. Where a

tenancy determined, upon the expiration of the term, the landlord could have ejected the tenant "on the title"; but section 5 gave the landlord the alternative, where the tenant stayed on in possession for a month after demand, to treat that new tenancy as a renewal of the old tenancy from year to year.

Notice to Quit.—A tenancy from year to year goes on from year to year, and in order to determine such a tenancy a notice to quit must be served.

Notice to quit in the case of non-agricultural tenancies must be a half-year's notice, expiring at the end of the first or some other year of the tenancy. This rule applies where the tenancy was created by express agreement, or implied by law from the payment of rent or from other circumstances. The notice should expire at the end of some year of the tenancy—that is to say, it should be served for some anniversary of the day on which the letting began. When the date of the commencement of the tenancy is unknown the notice should be for the last gale day of the calendar year, for by section 6 of Deasy's Act every tenancy from year to year is presumed to have commenced on the last gale day of the calendar year until it shall appear to the contrary. The notice to quit must be clear and definite (*See* judgment of Cotton, L.J., in *Aherne* v. *Bellman* (*a*)), and must extend to all the premises which are included in the letting. A notice to quit part only is bad.

As regards tenancies less than tenancies from year to year, the rule is that the time for which a person takes the premises is his own agreed measure of convenience as to the notice to be given to him : *Beamish* v. *Cox* (*b*). Thus, a month's notice is always sufficient in the case of a monthly tenancy and a week's notice in that of a weekly tenancy. And the rights of landlord and tenant are reciprocal as regards length of notice. Strictly speaking, in such cases, law only requires a *reasonable*

(*a*) 4 Ex D. 212.
(*b*) 16 L. R. Ir. 276.

notice to determine the tenancy, but the law treats as reasonable a notice as long as the period for which the place is taken; so that, though a notice as long as the period of the tenancy is always sufficient, a shorter notice may be so too, if held to be reasonable. The parties to a tenancy may contract for a different notice, either that a longer notice shall be necessary or that a shorter notice shall be sufficient, or even that no notice whatever shall be necessary.

In a **statement of claim** in an ejectment for overholding, where a lessor sues a lessee, no title need be shown, as the defendant is estopped from denying the plaintiff's right to make the lease. It is sufficient to state generally that the plaintiff demised or let lands to the defendant by a lease or agreement of a certain date for a term of years commencing on a certain day and ending on a certain day; that the defendant is in possession under the said lease or agreement; that the lease has been determined (stating whether by affluxion of time or by notice to quit or how); and that the defendant wrongfully retains possession (*a*). The tenant in general cannot dispute the title of his lessor, whether the original lessor or some assignee be the plaintiff. Therefore, if a demise be shown and title be traced from the lessor to the plaintiff, no other evidence of title need be given. Where the plaintiff derives title from the lessor, the title of the lessor must be alleged, and the devolution of title from the lessor to the plaintiff must be concisely set out. For instance, if the plaintiff sues as heir-at-law of the lessor, he must allege that the lessor held in fee at the date of his death, and he should state the pedigree sufficiently to show how he is heir: *Palmer* v. *Palmer* (*b*); so if a plaintiff sues as devisee he should allege that the testator at his death was entitled in fee—that by a will dated———duly executed, the testator devised the said lands to the plaintiff, and that the testator died on———day.

(*a*) See Roscoe, N. P., 17th Ed., p 993; and see Appendix C., sec. vii, No. 1; Rules S. C., 1905; Wylie, Jud. Acts, p. 1260.

(*b*) [1892] 1 Q. B. 319.

Defence.—The defendant who is in possession may rely on such possession, because the fact of possession is *primâ facie* evidence of title; and the plaintiff in an action for the recovery of land must recover on the strength of his own title, and not through any defect in the defendant's title (*See Miller* v. *Kirwan* (*a*); *Coppinger* v. *Norton* (*b*)). The form of the plea is "The defendant is in possession of the said lands and premises" (*c*).

This plea has the effect of a specific denial of every material fact in the statement of claim, and enables the defendant to prove at the trial any legal defence he may have. But it does not enable the defendant to rely on an equitable defence, Such a defence must be specially pleaded: *Danford* v. *M'Anulty* (*d*). This plea is a survival of the old method of pleading, and is an exception to the general rule of pleading by which denials must be specific and deal with each allegation of fact (*e*).

An equitable defence to an action of ejectment on the title would be afforded by an agreement by the plaintiff to give the defendant a lease of the premises.

AGRICULTURAL HOLDINGS.

Agricultural holdings must also be considered in two classes—(1) where a fair rent has *not* been fixed and (2) where a fair rent *has* been fixed.

(1) As regards agricultural tenancies where a fair rent has *not* been fixed. Like the house in town, if they are held for a term, the tenancy will be determined by effluxion of the term unless they fall within the class of "existing leases" expiring within sixty years from the passing of the Act of 1881, the lessees being in such case entitled to have fair rents fixed under the 21st section of that Act.

(*a*) [1903] 2 Ir. R. 122.
(*b*) [1902] 2 Ir. R. 232.
(*c*) See Rules S. C. 1905; App. D., sec. vii., No. 1; Wylie, Jud. Acts, p. 1269.
(*d*) 8 App. Cas. 456; and see Or. XXI., rule 23; R. S. C, 1905.
(*e*) See Rules S. C., 1905; Or. xix., rule 18; *Ib.* 385.

Agricultural Holdings excluded from Land Law Acts.—Many holdings excluded from the right to get fair rents fixed are agricultural in character, and to such holdings the Notice to Quit Act (*a*) applies. That Act provides that a year's notice to quit expiring on any gale day shall be necessary and sufficient to determine a tenancy from year to year. The tenant, say, of a house in Dublin, is only entitled to six months' notice; he must be served on the last gale day of the year or the anniversary of the letting. The tenant of a farm must get a year's notice to quit, but it can be served for *any* gale day. This provision of the Notice to Quit Act only applies where there is no express agreement in writing as to the time and the mode of determining such tenancies, so that it too may be excluded by the contract of the parties. Just as in the case of a town house, such a tenancy may also be surrendered.

"One of the objects of the Act of 1881," says Andrews, J., "undoubtedly was to give to tenants an increased security of tenure; but it did not abolish notices to quit. It contemplated their continuance, but qualifies their effect, and gives tenants, to a liberal but limited extent, the means of protecting themselves against the consequences of them. The mere service of a notice to quit will no longer determine the tenancy. In order to make it effectual for this purpose, proceedings to enforce it must be taken by the landlord, and be allowed to continue unrestrained by the Court; but, as I read the Act, the tenancy will be absolutely determined if in such proceedings the landlord obtains a judgment or decree (*b*) for possession, and, by execution issued on foot of such judgment or decree, recovers actual possession. In the interval, however, between the commencement of the proceedings and the recovery of possession under the execution, in case the tenant desires to acquire a statutory term in his holding at a fair rent, to be fixed by the proper Courts, the 3rd sub-section of section 13

(*a*) 39 & 40 Vict., c. 63, s. 1.
(*b*) *i.e.*, "judgment" of the High Court, "decree" of the County Court.

(of the Act of 1881) enables him to apply to the Court before which the proceedings are pending, and empowers that Court, on such terms and conditions as it may direct, to postpone or suspend the proceedings for compelling the tenant to quit his holding until the termination of the proceedings, if taken by the tenant to acquire a statutory term in his holding at a fair rent. Now, the first sub-section of section 13 provides for the case of a tenant against whom proceedings have been taken to compel him to quit his holding, desiring to sell his tenancy, which he is empowered to do at any time before the execution of a writ of possession; and the construction I put upon the words—'and any such tenancy so sold shall be and be deemed to be a subsisting tenancy, notwithstanding such proceedings'—is that, for the security of the purchaser, they expressly declare the tenancy to be subsisting in his hands, not absolutely, but so as clearly to confer upon him similar rights to those which his vendor would have had, of taking proceedings to acquire a statutory term in the holding at a fair rent, and, if necessary, of applying to the Court to postpone the pending proceedings under which the landlord might, by recovering possession, absolutely determine the tenancy in the meantime; but according to my view, if the purchaser takes no steps to acquire a statutory term and allows the landlord to continue his pending proceedings and recover possession, the tenancy becomes absolutely determined in his hands as it would have been in the hands of the vendor": *Haren* v. *Archdale* (*a*).

(2) The second class of case is where a fair rent *has* been fixed. The tenant's interest where a fair rent has been fixed goes on for recurring periods of fifteen years, if he does not care to get the rent fixed for a new statutory term he remains on subject to the same rent and conditions. Such a tenancy cannot be determined as an ordinary tenancy might have been. Section 5 of the Act of 1881 provides that the tenant shall not be compelled to quit the holding of which he is tenant except

(*a*) 12 L. R. Ir. 312, 313.

in consequence of the breach of some one or more of the statutory conditions set out in that section. The first of these is—" the tenant shall pay his rent at the appointed time," so that a judicial tenant may be ejected for non-payment of rent (*a*).

Landlord's Right of Resumption.—Again, a judicial tenant is subject to have his tenancy determined by the exercise of the landlord's statutory right of resuming possession given him by Section 5 of the Act of 1881, which enables the Court, during the continuance of a statutory term in a tenancy, on the application of the landlord and upon being satisfied that he is desirous of resuming the holding or part thereof for some reasonable and sufficient purpose, having relation to the good of the holding or of the estate (several of these purposes are specified in the section), to authorise the resumption thereof by the landlord upon such conditions as the Court may think fit, and it authorises the Court to require the tenant to sell his tenancy, in the whole or in such part, upon such terms as may be approved by the Court, including full compensation to the tenant. Section 20 of the Act of 1881 prescribes rules as to the determination of a tenancy to which the Act applies. Such a tenancy, this section says, " shall be deemed to have determined whenever the landlord has resumed possession of the holding, either on the occasion of a purchase by him of the holding or of default of the tenant in selling or by operation of law or reverter " (*b*). Previously a mode of determining a tenancy from year to year was mere service of a notice to quit by either party and the expiration of the prescribed period.

Surrender.—A tenancy may be determined by surrender. Surrender is a yielding up by the tenant of his interest to his landlord with a view to merger. The two interests coalesce, the tenancy becoming merged in the landlord's reversion.

(*a*) See Chapter IX.

(*b*) Reverter means that the tenancy comes back to the landlord upon the death of the tenant intestate and without leaving any person entitled to his personal estate. See Act, 1881, s. 3.

A tenant who has taken lands for a term certain—for instance, by lease for a given number of years—cannot, of course, put an end to his liability to fulfil the terms of his contract unless the landlord be willing to accept surrender, except where such power is given by statute.

A " clause of surrender " is very frequently inserted in leases entitling the lessee at his option to surrender at stated times during the currency of the lease. The conditions prescribed by the lease as to surrender must be strictly complied with.

The 7th section of Deasy's Act requires **surrender to be in writing** signed by the tenant or his agent thereunto lawfully authorised in writing, or by act and operation of law. A surrender cannot be made to take place *in futuro : Doe d. Murrell* v. *Millward* (*a*). It must operate as an immediate conveyance of the tenant's interest. A tenant from year to year can surrender his tenancy at any time without his landlord's consent upon duly serving a notice of surrender, which is a notice to quit within the Notice to Quit Act, 1876. The rights of landlord and tenant in this respect are reciprocal : *O'Brien, a minor* (*b*).

Various statutes confer powers on lessees to surrender their leases in advance without the concurrence of their landlord. The common law treated the covenants in a lease as collateral to the letting, and so bound the tenant to pay the rent, notwithstanding the destruction of the subject-matter, but section 40 of Deasy's Act enables a lessee, not bound by covenant to repair, to surrender upon destruction of a dwelling-house, where it is the substantial matter of a demise.

In the case of a surrender to or resumption by the landlord of any portion of the premises, his right in respect to the residue of the lands is not to be prejudiced (Deasy's Act, section 44). The old rule was that the landlord could not recover any rent out of the residue. The rent was an entire

(*a*) 3 M. & W. 328.
(*b*) 19 L. R. Ir. 429.

thing, the land demised an entire thing, and he could recover the whole or nothing, but in England, in *Baynton* v. *Morgan* (*a*), it was held that the lessor could sue the lessee for an apportioned rent in respect of portion of premises not surrendered.

Surrenders are often endorsed on the lease which is given up to the landlord, and should (when the lease surrendered is of value) be registered in the Registry of Deeds Office.

The Court of Appeal has held, in *Conroy* v. *Marquis of Drogheda* (*b*), that there is nothing in the Act to prevent a *bona fide* surrender by operation of law of an old tenancy and the acceptance of a new one without any change of possession, where this is clearly the intention of the parties. A present tenancy, therefore, can be determined and a new future tenancy be created in the same holding without any change in this occupation; but the parties must clearly intend to effect the alteration—it will not be implied as the indirect effect of a transaction which had a different object in view.

Surrender by Middleman.—Where a middleman pays rent for a holding which is wholly sublet, and the rent received by the middleman is reduced by the Court to a sum less than the rent which he pays, he may surrender his estate in such holding (Land Act, 1887, section 8, sub-section 1).

Where part only of the holding is sublet, and the rent received by the middleman has been reduced by the Court, so that when added to the fair rent of the part not sublet it is of less amount than the rent paid by the middleman, he may in this case also surrender his estate (section 8, sub-section 2).

Tenancies created by Limited Owner.—At common law a tenancy could last only so long as the estate of the landlord who created it continued to subsist. For instance, an owner for life (except under a power in the settlement which made him tenant-for-life) could make no lease for a

(*a*) 22 Q. B. D. 74.
(*b*) [1894] 2 Ir. R. 590.

term longer than his own life: *Monaghan* v. *Hinds* (*a*). The Settled Land Act, 1882 (*b*), replacing previous similar Acts, enables a tenant-for-life or in tail in possession under a settlement to grant leases of any of the settled lands (except the principal mansion house and demesne) in Ireland for 35 years, and building leases for 99 years.

It is not essential that a landlord should have a good title to lands in order that he should create a tenancy in them. If a mortgagor in possession created tenancies after the date of his mortgage they would be valid against him (*c*), though the mortgagee was not bound by such a tenancy unless he chose to adopt it. His acceptance of rent from the tenant of the mortgagor was held to be only evidence of a new tenancy from year to year between the mortgagee and such tenant.

Lettings made by the mortgagor prior to the mortgage were binding upon the mortgagee as assignee of the reversion, just as a purchaser from an owner who had made a letting prior to the sale would be bound by that letting.

The 10th section of the Land Act of 1896 deals with lettings by persons not absolute owners. Prior to the passing of that Act, a present tenancy, whether a fair rent was fixed or not, on the principle referred to, could last only as long as the estate of the landlord who created it. The 10th section of the Act of 1896 enacted that "the Land Law Acts shall apply and be deemed to have always applied in the case of tenancies created by a limited owner, or by a mortgagor or mortgagee in possession, and the tenancies shall not be or be deemed to have been determined (except in the case of fraud or collusion, or a letting at a gross undervalue) by the cesser of the interest or possession of such limited owner, mortgagor, or mortgagee, and the person entitled on such cesser to receive the rent of the holding shall stand in the relation of landlord

(*a*) [1895] 2 Ir. R. 691-692.
(*b*) 45 & 46 Vict., c. 38, sections 6 and 65 (10).
(*c*) And see Conveyancing Act, 1881, 44 & 45 Vict., c. 41, section 18.

to the tenant of the holding, and have the rights and be subject to the obligations of landlord accordingly." So that the cesser of the landlord's estate out of which a present tenancy has been carved no longer causes the determination of the tenancy or the statutory term for which a fair rent has been fixed.

CHAPTER XI.

RECOVERY OF POSSESSION.

Person having a Right of Possession may Enter—Action for Recovery of Land—Legal Estate not Essential for Recovery of Possession—Ejectment on Title—Ejectment for Overholding—Defence to Ejectment for Overholding—Mesne Profits—Summary Recovery of Cottier Tenement.

A LANDLORD is entitled to resume possession of land which has been let to a tenant where the term expires by lapse of time, or by the death of the *cestui que vie* for whose life the lands are held, or where the tenancy is determined by notice to quit, or the landlord may be entitled on forfeiture for breach of covenant. **A person having a right of possession may enter** peaceably, and, being in possession, may retain it without first establishing his right by action. And he is not liable in an action for trespass to the land, and it seems equally clear that even if he enters forcibly he is not liable to such an action. The leading authority is the well-known "six carpenters' case" (1 Smith's L. C. 138). In *Beattie* v. *Mair* (*a*), Palles, C.B., says.—"I think it clear upon principle and authority that a civil action cannot be maintained against the true owner by one wrongfully in possession merely for expelling him by force, and with a strong hand, from his unlawful possession." (There was no allegation of assault in that case.) The eviction by the true owner from the possession of lands, of which the plaintiff is in wrongful possession,

(*a*) 10 L. R. Ir. 208.

cannot be either general or special damage. When he has peaceably and lawfully entered and become possessed he may turn out all previous occupiers as being trespassers, provided he uses no more force than is necessary; or he may bring an action of trespass against them.

But if an entry is made under such circumstances as render it a forcible entry within the meaning of the statutes relating to forcible entry—for instance, if it is effected by the breaking of padlocks or the use of crowbars—the person so entering is apparently liable in an action for any assault or other independent wrong or injury, such as damage to furniture, done in the course of or after such entry. Such expulsion is rendered wrongful by 10 Car. 1, c. 3, s. 13 (Ir.). The remedy given by that statute is a remedy by indictment, the prohibition being one for the public generally.

Action for the Recovery of Land.—The more usual and the safer method of recovering possession of land is by what used to be called an ejectment, and is now called an action for the recovery of the land. The question in such an action is the legal right of the plaintiff to the present possession. It is wholly different from an action to establish title. The action of ejectment deals with possession and possession alone: *Howard* v. *Howard* (*a*).

At common law lands were not recoverable by personal action, but by what was known as a real action. This is now abolished. But about the time of Henry VII. it was decided that a lessee for years who had been wrongfully dispossessed might bring an action of *ejectione firmæ* and, by judgment in such action and a writ of *habere* (*b*) grounded on it, recover possession of the land. The persons in possession are the proper defendants, and although a person in receipt of the rents and profits is directed by our rules of court to be served with the writ, this is merely to enable him to defend, if he thinks fit, the possession of his tenant. The mode of trying

(*a*) 30 L. R. Ir. 349.

(*b*) The writ sent to the sheriff after judgment for recovery of possession is called *habere*, from the opening words *habere facias possessionem*.

the right to possession of land is by an action for recovery of land, and since the Judicature Act the right to bring such an action exists in every case in which, before the Act, the old action of ejectment might have been maintained: *Howard* v. *Howard* (*a*). The judgment determines no question of title or estate, and the writ of execution by which it is enforced relates to the lands and not to the defendant personally: *Howard* v. *Howard* (*b*). In such an action the real question is the right to immediate possession.

Legal Estate not Essential for recovery of Possession.—Since the Judicature Act no action for recovery of land can be defeated for want of the legal estate, where the plaintiff has a title to the possession, because where the plaintiff claims to be entitled to any right by virtue of an equitable estate the High Court in whatever Division the action is brought must give the same relief as ought to have been given by the Court of Chancery (*See* the case of the *Antrim Land Investment Co.* v. *Stewart* (*c*)).

In all cases the plaintiff will have to prove his right, to the premises for which ejectment is brought, at the time of the issuing of the writ of summons.

Ejectment on the title between landlord and tenant is one class of ejectment, and ejectment for non-payment of rent is another. Every ejectment is in a sense one of title—title to the actual possession—which the plaintiff is in all cases bound to prove; but those are usually so called, which are brought for any other cause than non-payment of rent, and therefore ejectments have been classified as ejectments on title and ejectments for non-payment of rent.

Ejectment on Title.—Of ejectments on title by the landlord against a tenant the most usual are for the breach of a condition entitling the landlord to re-enter, or for overholding after the determination of a lease. Assuming that the lease authorises the landlord, on the happening of certain

(*a*) 32 L. R. Ir. 473.
(*b*) 30 L. R. Ir. 349.
(*c*) [1904] 2 Ir. R. 364.

events, to avoid it for breach of condition, he must, before action, serve notice required by section 14 of the Conveyancing Act of 1881, which provides that a right of re-entry or forfeiture for breach of a covenant contained in a lease is not to be enforced by action or otherwise until notice has been served on the lessee. But sub-section 6 provides that this does not extend to a covenant or condition against assignment or sub-letting or disposing of the land, or to bankruptcy or taking in execution of the lessee's interest. The notice to be served on the lessee must specify the breach complained of, and if it is remediable must call upon him to remedy it, and in any case to make compensation for the breach; it is only when the lessee fails to comply within a reasonable time that the forfeiture can be enforced. A Court of Equity has jurisdiction to relieve against forfeiture caused by assignment without consent, contrary to a covenant. But the general rule is not to give relief except in case of fraud, accident or surprise.

Ejectment for Overholding.—Option is given by section 5 of Deasy's Act, where a tenant continues in possession for a month after his tenancy has expired, to treat this as constituting a new tenancy from year to year. The landlord may, however, eject the tenant.

The landlord cannot resume possession in the case of holdings coming within the fair rent provisions of the Act of 1881. His option to do so has been taken away by the 21st section of that Act. The 5th section of Deasy's Act is in substance applied by the Act of 1881 to every tenant of an expired lease, and the effect of the 21st section of the Act of 1881 was no more than to compel the tenant to continue in possession and the landlord to elect to treat him as tenant (*See* judgment of Palles, C.B., *Ireland* v. *Landy* (*a*)).

No demand for possession is necessary before commencing an action for overholding, because the tenant knows how long he has taken the premises for. This reasoning does not apply where the tenancy is a tenancy at will, in which case a demand

(*a*) 22 L. R. Ir. 422.

may be necessary in order to determine it. In an action for overholding it is necessary for the landlord to prove the contract of tenancy and its expiration, and also that the possession of the defendant is in some way connected with the tenancy. Although *ex hypothesi* the relation of landlord and tenant has ceased to exist, still the principle that the tenant is estopped from denying the landlord's title is applicable; so that the plaintiff may recover from the overholding tenant, though he may have himself no title. The tenant, however, may show that the landlord's interest has determined since the tenancy was created, or that he himself was the true owner.

A tenancy may be determined in five different ways so as to give rise to ejectment for overholding—(1) by demand of possession in the case of a tenancy at will; (2) by service of notice to quit if the tenancy be one from year to year and not a "present" tenancy within the Land Acts; (3) by forfeiture for breach of covenant or conditions; (4) by effluxion of time in the case of lease for a term not within the 21st section of the Land Act of 1881; and (5) by death of the last *cestui que vie*, where there is no right of renewal. If an ejectment be brought upon the expiration of a lease for lives, the *onus* lies on the landlord of proving the death of the *cestui que vie*. Persons who have been absent unheard of for seven years are presumed to be dead: 7 Wm. III., c. 8 (Ir.). In an action for overholding it is not necessary to serve the writ of summons upon any person other than those in actual occupation of the lands as tenant or undertenant (Order IX., rule 10, of the Rules of Court, 1905).

Defence to Ejectment for Overholding.—A tenant may set up as a defence to an ejectment for overholding any defence at law or in equity—in the Civil Bill Court by section 59 of Deasy's Act, in the Superior Court by section 85 of the Common Law Procedure Act, 1856. For instance, a defendant in a civil bill action for overholding can rely on a parol agreement for a new lease of which there has

been part performance, or upon a right of renewal of a renewable lease which has expired (*see Ex parte Peyton* (*a*)); or he may defend on the ground that the landlord by his conduct has acquiesced in a tacit renewal of the tenancy: *Cusack* v. *Farrell* (*b*).

Where a tenant wilfully (that is, with a consciousness that he has no right to do so) overholds after determination of his tenancy and after demand, it is provided by section 76 of Deasy's Act that he shall during such overholding pay double the rent that he would have paid ordinarily. This provision is very seldom resorted to.

Mesne Profits.—The plaintiff in an action of ejectment either for non-payment of rent or for overholding may recover possession and the rent or mesne profits (Deasy's Act, section 77). "Mesne profits"—intermediate profits—are profits of land taken by a tenant in wrongful possession from the time that the wrongful possession commenced to the time of the trial of the action. The claim for mesne profits is a claim in tort founded upon the wrongful possession of the defendant. It must therefore be shown that there was no consent on the part of the landlord to the defendant overholding. The amount recoverable as mesne profits is the value of the occupation of the premises for the period which is usually measured by the rent.

Summary Recovery of Cottier Tenements.—Summary recovery of any cottier tenement may be obtained under section 85 of the Act of 1860, where the rent is in arrear for forty days, by proceedings at Petty Sessions. And by section 86, where any cottier tenant whose interest has been determined by notice to quit, or any person put into possession of any lands or premises by permission of the owner as servant, herdsman or caretaker, refuses to give up possession on demand, he may be served with a summons to appear at Petty Sessions to show cause why possession should not be delivered up, when the

(*a*) 21 L. R. Ir. 371.
(*b*) 18 L. R. Ir. 494.

justices may issue a warrant to a special bailiff requiring and authorising him to give possession of the premises to the landlord.

It is under this section that magistrates have jurisdiction to order summary recovery of possession of premises occupied by former tenants, but who have been converted into caretakers, by service of the notice prescribed by section 7 of the Act of 1887.

PART II.

LAND PURCHASE

CHAPTER I.

INCEPTION AND DEVELOPMENT OF LAND PURCHASE.

Purchase of Holding by Tenants—Order Attaching Claims to Purchase-money—Purchase Annuity Charged on Holding—Sale of "Estates"—Lands must be Declared an Estate by Estates Commissioners—Zone Prices—Sale to Land Commission by Landlord—Sales under Landed Estates Court Act—Tenant's Option to Purchase—Purchase by Land Commission from Land Judge—What may be Bought—Who may Buy—Re-sale to Vendor—Limitation on Amount of Advance—Who may be Vendor—Sale by Limited Owner—Sale under Settled Land Acts—Sale by Mortgagees.

THE Land Purchase Acts (*a*) enable occupying tenants of agricultural or pastoral land to become the owners of, and to buy out, their landlord's interest by means of an advance of public money repayable in half-yearly instalments, secured by being charged upon the purchased holding.

The Purchase of Holdings by Tenants.—The earliest of the Acts under which public money was advanced to enable tenants to purchase their holdings was the Irish Church Act, 1869 (*b*), under section 52 of which tenants were enabled to purchase land, and were credited with part of the purchase-money, secured by mortgage given to the Church Temporalities Commissioners. In some cases these advances were secured by a simple mortgage, in other cases by an instalment mortgage, providing for the payment of

(*a*) The Land Purchase Acts, as defined by the Acts of 1891, 1896, and 1903, include the Landlord and Tenant Act, 1870 (Parts II. and III.); the Landlord and Tenant Act, 1872; the Land Act, 1881 (Parts V. VI. and VII.); the Tramways and Public Companies Act, 1883 (Part II.); the Land Purchase Act, 1885; the Land Act, 1887 (Parts II. and IV.); the Land Purchase Acts, 1888, 1889, and 1891; the Redemption of Rent Act, 1891; the Land Act, 1896 (Parts II., III., and V.); the Land Purchase Act, 1901, and Irish Land Act, 1903 (Part. I.), to which is to be added the Irish Land Act, 1904.

(*b*) 32 & 33 Vict., c. 42.

the principal sum, with interest at 4 per cent., by instalments, extending over a term of years (*See* section 25 of the Land Law Act, 1887, which provide for the reduction of interest to $3\frac{1}{8}$ and an extension of the term for repayment to forty-nine years).

The 32nd section of the Land Act of 1870 (*a*) provided that the landlord and tenant of any holding might agree for the sale of the holding at a price to be fixed between them, and then apply to the Landed Estates Court for the sale to the tenant of his holding.

Under the Act of 1870, the Board of Public Works, if satisfied with the security, might, under section 44, advance to any tenant for the purpose of purchasing his holding any sum not exceeding two-thirds of the price of the holding. Upon the advance being made the holding was deemed charged with an annuity of £5 per cent. of the advance, repayable in 35 years. This was extended by the Land Purchase Act, 1885, section 4, and the annuity made repayable in 49 years at 4 per cent.

The powers of the Board of Works in reference to land purchase were by the Land Act of 1881 (section 35) transferred to the Irish Land Commission constituted by that Act, and the amount which might be advanced was increased to any sum not exceeding three-fourths of the purchase-money (section 24).

The Purchase of Land Act, 1885, 48 & 49 Vict., c. 73, enabled the Land Commission to advance to a tenant the *entire* purchase-money if the repayment of the advance were secured by a "guarantee deposit" of not less than one-fifth of the advance (section 3).

The Land Law (Ireland) Act, 1896, permitted the guarantee deposits to be dispensed with (section 29), and in its 25th section extended the period for repayment to 73 years, and provided for the reduction of the purchase annuity every tenth year for the first thirty years. This reduction was not confined to purchasers under the Act of 1896, but extended to all

(*a*) 33 & 34 Vict., c. 46.

purchasers under any of the Acts since 1870, unless they applied that such reduction should not be made.

But as regards advances made pursuant to agreements entered into since the Irish Land Act of 1903, this decadal reduction has been abolished. Under this latter Act advances are repayable by an annuity lasting for sixty-eight and a half years at $3\frac{1}{4}$ per cent., of which $2\frac{3}{4}$ per cent. is interest and $\frac{1}{2}$ per cent. is repayment on foot of principal.

Up to 1885 sales were carried out by conveyance, and from 1885 by vesting order under section 8 of the Act of 1885. The Land Commission may now, instead of making a vesting order, fiat the agreement for the purchase of the holding (Act of 1896, section 32).

Order Attaching Claims to Purchase Money.—By section 14 of the Land Act of 1887, when a landlord and tenant are *primâ facie* entitled to carry an agreement for sale of a holding into effect, the Land Commission are empowered to pay the amount of the advance for the purchase-money into the Bank of Ireland, and by order to declare that the claims of all persons (except the tenant and persons claiming under him) interested in the lands sold shall attach to the purchase-money in like manner as before the sale they attached to the land, and shall cease to be of any validity as against the land. These claims are subsequently discharged or redeemed out of the purchase-money. The purchase-money represents the land sold to the extent of the interest which the landlord has agreed to sell.

Purchase Annuity charged on Holding.—The annuity to secure an advance payable to the Land Commission is, by section 20 of the Act of 1887, made a charge on the holding with priority over all existing and future estates, interests, and incumbrances created either by the landlord or the tenant, or their respective predecessors in title, with the exception of quit rent (*a*) and other charges incident to the tenure, rent-charges in lieu of tithes (*a*), and any charges for

(*a*) See Appendix, p. 125

advances of public money; and (where lands are subject to a fee-farm rent, or held under a lease reserving a rent) with the exception of such rent.

The annuity payable to the Land Commission in respect of an advance is an incorporeal hereditament or rent-charge issuing out of and charged upon the lands, separate from and paramount to the estate of the owner.

Sale of Estates.—The Land Purchase Acts prior to 1903 dealt with the sale and purchase of separate holdings, but the Act of 1903 introduced a new method—namely, sale and purchase of holdings forming portion of an "estate." "Estate" is defined (section 98, sub-section 1), "any lands which the Estates Commissioners (*a*) may declare fit to be regarded as a separate estate for the purposes of this Act."

Lands must be Declared an Estate by Estate Commissioners.—The determination and declaration that lands are an "estate" is a condition precedent to carrying out a sale under the Act of 1903. It is the foundation of the jurisdiction to proceed with the consideration of the application for advances and with the other steps towards the sale of the lands under that Act. But holdings may still be sold and advances made under the earlier Purchase Acts (See *Boyle's Estate* (*b*); *Weir's Estate* (*c*)).

"Zones" Prices.—In the case of the sale of an estate where an advance under the Land Purchase Acts of the whole of the purchase-money of a holding is applied for, it is mandatory upon the Land Commission to sanction the advance where the holding is subject to a judicial rent, provided that in the case of rents fixed since the Act of 1896 the purchase annuity will not be less than ten nor more than thirty per cent. below the existing rent—*i.e.*, between $27\frac{1}{2}$ and $21\frac{1}{2}$ years' purchase of that rent; and where the judicial rent has been fixed before that date, if the purchase annuity will

(*a*) The Estates Commissioners are three members of the Land Commission to whom the administrative duties connected with Land Purchase have been entrusted by the Act of 1903 (section 23, sub-section 1).

(*b*) [1909] 1 Ir. R. 120. Aff. by C. A.

(*c*) [1908] 1 Ir R. 161.

not be less than twenty nor more than forty per cent. below that rent—*i.e.*, between 24½ and 18½ years' purchase.

These limits are known as the "zone" prices. And the Estates Commissioners have no jurisdiction to refuse an advance or to investigate the adequacy of the security for an advance in such cases (section 1, sub-section 1, a and b, Act of 1903). Where these proportions between the agreed price and the previously fixed judicial rent exist, this is conclusive evidence for the purposes of the Act that the advance is sufficiently secured and the price equitable to both the parties.

In the case of judicial rents the Land Commission, where the prices agreed upon do not fall within the zones, may sanction the advance if they are satisfied with the security, and if, after giving all persons interested an opportunity of being heard, they consider the agreed price to be equitable (section 1, sub-section 2).

A price so high that the instalments will not be secure concerns the Treasury and the purchaser; a price that is too low may injure a needy or reckless vendor, or incumbrancers, or the owners of limited interests in settled estates.

Where a holding is not subject to a judicial rent it may be sold under the Land Purchase Acts, the advance of the whole or part of the purchase-money by the Land Commission being also discretionary in that case (section 5).

Sale to the Land Commission by Landlord.—A landlord, instead of selling each of the holdings in the "estate" to the respective tenants with the help of money thus advanced by the State, may sell to the Land Commission, and they, after due enquiry, may purchase the estate for re-sale to the tenants (section 6).

The price is to be estimated, having regard to the provisions of the Act in respect of advances and to the prices which tenants and persons treated as tenants for the purposes of the Act are willing to give for the holdings, and if three-fourths of the tenants in number and rateable value undertake to purchase from the Land Commission, then

the Commission may agree to purchase the estate for the estimated price.

Sales under Landed Estates Court Act.—The Landed Estates Court (Ireland) Act, 1858 (*a*), gave jurisdiction to the Judge of a Court especially created for that purpose to sell estates for the purpose of discharging incumbrances affecting landed estates in Ireland. On the passing of the Judicature Act, in 1877, the jurisdiction of this Court was transferred to the Chancery Division, Land Judges.

Any incumbrancer might present a petition for sale where the interest on his incumbrance was more than twelve months in arrear, and upon such a petition a conditional order for sale was made, which was subsequently made absolute if cause were not shown.

The 40th section of the Act of 1896 gave to each tenant in occupation of agricultural and pastoral lands, in respect of which an absolute order for sale was made by the Land Judge, a right he never had before—namely, a distinct interest in a sale; for where an absolute order for sale of an estate has been made, and either a receiver had been appointed or the estate is so circumstanced that it would be sold by the Land Judge, without the consent of the owner as to price, the Land Commission, upon the request of the Land Judge, must cause the estate to be inspected and a report made as to the circumstances thereof, and the price and conditions under which sale of the holdings to the tenants under the Land Purchase Acts can properly be made.

The Land Judge, after giving all parties an opportunity of being heard, and considering the report and any offers for the purchase of the estate, must make to each tenant an offer to sell to him the fee-simple of the holding at such price as the Land Judge considers reasonable. If the tenants, to the extent of not less than three-fourths in number and rateable value, accept the offers the Land Judge may order

(*a*) 21 & 22 Vict., c. 72.

that the remaining tenants shall be deemed to have accepted the offers made to them.

This section may, upon the application of the owner, be applied to an estate although a receiver has not been appointed and the estate is not insolvent.

Tenants' Option to Purchase.—In *Owens' Estate* (*a*) the Court of Appeal held that the Land Judge cannot proceed to sell an estate coming within this section to outside purchasers without first offering it to the tenants, but the Land Judge could, for good cause, cancel the order for sale and dismiss the petition (*See* the judgment of Sir P. O'Brien, L.C.J., in *Owens' Estate* (*b*)).

The 58th section, sub-section 2, of the Act of 1903 provides that the 40th section of the Act of 1896 is not to apply to a person in occupation of demesne lands under a letting made by the Land Judge unless he so directs.

Purchase by Land Commission from Land Judge.—The 7th section of the Act of 1903 provides machinery whereby the Land Commission can purchase an estate, for the sale of which an absolute order has been made under the Landed Estates Court Acts, and then re-sell to the tenants. The procedure is analogous to that prescribed by the 40th section of the Act of 1896.

Where the Land Commission make an offer under section 7, the provisions of section 40 of the Act of 1896 are suspended (section 7, sub-section 6).

Where an estate is purchased by the Land Commission, and tenants on the estate to the extent of three-fourths in number and rateable value have agreed to purchase their holdings, the Estates Commissioners may order that the remaining tenants shall be deemed to have accepted the offers made to them (Act of 1903, section 19).

The Estates Commissioners have power under section 8 to purchase untenanted land for the purpose of facilitating

(*a*) [1897] 1 Ir. R. 200, and see *Wemy's Estate*, *Ib.* 340.
(*b*) [1897] 1 Ir. R. 208.

the re-sale or re-distribution of estates purchased or proposed to be purchased.

What may be Bought.—The Land Purchase Acts apply to holdings although fair rents cannot be fixed upon them, and even though they may be altogether excluded from the Land Law Acts. Thus townparks, pasture holdings, portions of a demesne let to tenants, and other holdings excluded from the Land Law Acts by section 58 of the Act of 1881, or section 5 of the Act of 1896, are not excluded from the Land Purchase Acts, and advances may be made for the sale of such holdings by the Land Commission. Even houses in a town, if comprised in an estate which is mainly agricultural or pastoral, may be purchased under the provisions of this Act. But no estate can be purchased by the Land Commission which is not in the main agricultural or pastoral (section 10).

Who may Buy.—In the case of the sale of an estate advances under the Land Purchase Acts may be made (section 2) to—

(i.) A person being the tenant of a holding on the estate.

(ii.) The son of a tenant.

(iii.) The tenant or proprietor of a holding not exceeding five pounds in rateable value, situate in the neighbourhood of the estate.

(iv.) An evicted tenant or his personal representative.

(v.) A person in occupation of a parcel of land under a letting by the Land Judge or Receiver Judge was enabled, by section 40, sub-section 2, of the Act of 1896 to purchase under the Land Purchase Acts, though not in strict law an occupying tenant. But now section 53, sub-section 2, of the Act of 1903 limits the amount of advance to such a tenant (unless the land is resold to the vendor) to the sum of £1,000.

Re-sale to Vendor.—Where the owner of an estate has entered into agreements to sell to tenants, the Land Commission may purchase from him any demesne or other land in his occupation, and may re-sell the whole or any of that land

to him. The advance to an owner must not exceed one-third of the aggregate amount of the purchase-money of the holdings and other parcels of land comprised in the estate or twenty thousand pounds, whichever is the less (Act of 1903, section 3).

An owner, by availing himself of this section, may obtain advances at 3¼ per cent. and pay off incumbrances bearing probably interest at 5 or 5½ per cent.

Limitation on Amount of Advance.—The general limitation on the amount of an advance to any one purchaser under the Land Purchase Acts is £3,000 (Act of 1888, section 2). This may be increased to £5,000 where the Land Commission, for the purpose of carrying out sales to the same landlord, deem it expedient, and to £7,000 where the fair rent provisions of Land Law Acts apply. An advance for the purchase of a holding where the tenancy has been created after 1st January, 1901, cannot in general exceed £500 (Act of 1903, section 53). Except as provided by section 53, there is no restriction in the Land Purchase Acts as to the date when a tenancy commenced or as to the time it has been in existence before an advance can be made to the tenant for purchase. But every tenancy sold must be a real tenancy, and not conditional or for the purpose of getting money from the State. The question of *bona fides* is one of fact for the Estates Commissioners (*See Crosbie's Estate* (*a*)).

Who may be Vendor.—The persons having power to sell under the Land Purchase Acts comprise absolute owners in fee-simple or under fee-farm grants, tenants-for-life, and persons having the powers of a tenant-for-life within the meaning of the Settled Land Act, 1882 (45 & 46 Vict., c. 38), section 58, viz.:—

i. A tenant-in-tail.

ii. A tenant in fee-simple with an executory limitation gift or disposition over, on failure of his issue, or in any other event.

(*a*) [1907] 1 Ir. R. 136.

iii. A person entitled to a base fee.

iv. A tenant for years determinable on life, not holding merely under a lease at a rent.

v. A tenant for the life of another, not holding merely at a lease under a rent.

vi. A tenant for his own or any other life, or for years determinable on life whose estate is liable to cease in any event during that life.

vii. A tenant-in-tail after possibility of issue extinct.

viii. A tenant by the curtesy.

ix. A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life.

x. Absolute and, similarly, limited owners of leasehold estates where the lease is for lives or years renewable for ever, or for a term of years of which not less than sixty are unexpired at the time of the sale being made (*See* Land Act, 1870, section 33 ; Land Purchase Act, 1885, sections 5 and 6 ; Land Act, 1887, section 34).

xi. Trustees for sale or with a power of sale, bodies corporate, and trustees for charities have also power to sell under the Land Purchase Acts.

Sale by Limited Owner.—The Act of 1870 (section 33) enabled not only a landlord who was absolute owner to sell, but also any person entitled under any settlement for his own benefit, for the term of his own life, to the possession or receipt of the rents and profits of land, to sell the entire interest though he himself was only entitled to a life interest (*a*), provided that the estate, subject to the trusts of the settlement, was one in fee-simple or fee-farm, or held under a lease for lives renewable, or for a term of years, of which not less than sixty were unexpired at the date of the sale (*b*).

(*a*) And see section 25, Act of 1881.

(*b*) See also section 29, Act of 1881, and section 70, Act of 1903, which removes restraint on alienation.

Sale under Settled Land Acts.—A tenant-for-life or any person having the powers of a tenant-for-life, may sell the entire interest settled. In the case of sales under the Land Purchase Acts the notice required by the Settled Land Act, 1882, section 45, need not be given to the trustees before commencing the proceedings (Act of 1903, section 17). Trustees for the purposes of the Settled Land Acts are persons who are for the time being under a settlement trustees with a power of sale, or of consent to or approval of the exercise of such a power, or if there are no such persons then the persons declared by the settlement to be trustees thereof for the purposes of the Act. If there are no such trustees, then trustees for the purposes of the Settled Land Acts can be appointed by the Chancery Division. And the Land Commission can appoint such trustees for the purpose of any sale under the Land Purchase Acts (*a*), or to receive the redemption price of any superior interest which is in settlement.

Any land which is subject to a trust for sale may, by the combined effect of the 63rd section of the Settled Land Act, 1882, and the 6th and 7th sections of the Settled Land Act, 1884, be sold by the trustees for sale in the same manner as they could have sold before the Settled Land Acts; but the tenant for life may apply to the Court for leave to exercise the statutory powers of sale, after which, if leave should be granted, the powers of the trustees will be suspended. The destination of the bonus depends upon the fact whether such leave be given or withheld, for in the former case the tenant-for-life will be the vendor, and entitled to retain the bonus for his own use; in the latter case the trustees will receive the bonus, and must hold it on the trusts affecting the purchase-money.

Sale by Mortgagees.—Mortgagees *in possession* with power of sale can also sell under the Land Purchase Acts (Act of 1896, section 42). Mortgagees *not in possession* have no power to sell directly to the tenants under the Land

(*a*) Section 13, Act of 1885; section 23, Land Act, 1887.

Purchase Acts, as they are not landlords within the meaning of the Acts. But they can file a petition for sale in the Land Judges' Court, and the Land Judge can sell to the tenants under the 4th section of the Land Purchase Act of 1885; or the mortgagees may negotiate a sale to the Land Commission, and the Land Commission can then re-sell to the tenants.

The Land Commission may deal with any person as owner who gives *primâ facie* evidence that he is a person having a power to sell under the Land Purchase Acts, and satisfies them that for not less than six years immediately preceding he or his immediate predecessor-in-title has been in receipt of the rents and profits of the lands (Act of 1903, section 17)—that is, they may treat him as the proper person to enter into agreements for sale with the tenant, and for all purposes other than the distribution of purchase-money or payment of the bonus, without any further investigation of his title.

CHAPTER II.

THE BONUS.

When Bonus not payable—Limited Owner entitled to Bonus—Bonus when added to the Purchase-money—Vendor, who included in term.

In order to bridge over the difference between the prices at which tenants would be willing or able to purchase and those at which landlords would be willing or able to sell, and also to provide a margin to cover costs and expenses of the sales, it was provided that a percentage on the amount of the purchase-money advanced should be paid to the vendor out of moneys provided under the Act of 1903 for that purpose (section 48).

When Bonus not payable.—There are three classes of cases in which no bonus is payable:—(1.) When an estate insolvent as to capital is sold by the Land Judge. (2.) Where an absolute order for sale by the Land Judge of an estate insolvent as to capital was in force at the date of the passing of the Act (14th August, 1903). (3.) In the case of *any* estate sold by a mortgagee in possession (section 48, sub-section 4).

The bonus was fixed by the Act at 12 per cent. for the first five years, but is subject to quinquennial revision by the Treasury (Act of 1903, section 48, sub-section 3).

This bonus is personal to the vendor—the person who has the power to sell or to decline to sell—and therefore is not payable where a sale has already been ordered, or where a

sale can be enforced, without the consent of the owner as to price.

The practice of the Landed Estates Court and of the Land Judges' Court affords a guide on this question. "According to the practice in that Court, an estate would only be sold without the consent of the owner as to price in cases where the equity of redemption was valueless" (*See Grogan's Estate* (*a*)). Ross, J., in laying down that rule, followed Flanagan, J., in *Domvile's Estate* (*b*), who said:—"I never sell property here relying merely on my own judgment and without consulting the parties whom I consider interested in the proceeds of sale—that is to say, in the case of incumbered estates the persons representing the incumbrancers, and in the case of perfectly solvent estates the owners of the estates."

Limited Owner entitled to Bonus.—By the amending Act of 1904 (*c*), doubts which had arisen as to whether the vendor could retain the bonus for his own use were set at rest.

The 3rd section of that Act provides that where the vendor is a tenant-for-life the bonus shall, subject to the enactments contained in section 48 of the Act of 1903, "be retained by him as his own proper moneys for his own use and benefit, free and discharged from all claims upon the land sold or the purchase-money thereof, and from any trust affecting the same."

Bonus when added to the Purchase-money.—The 48th section (sub-section 1) contains an important proviso that "where an estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents and profits thereof, or where the percentage is payable in respect of an estate sold by the Land Judge, the percentage shall be added to the purchase-money, and shall not be paid to the vendor."

(*a*) [1896] 1 Ir. R. 616–7.
(*b*) Ir. R. 11 Eq. 1.
(*c*) 4 Ed. VII., c. 34.

Vendor, who included in Term.—The Act of 1903 contains no definition of the term "vendor," but it has been decided that it applies to all classes of persons who can sell under the Land Purchase Acts, and includes trustees express or constructive; and by sections 2 and 3 of the Act of 1904 the bonus is to be paid to the vendor, whether he is a person entitled to a beneficial interest in the land sold or is a trustee, to be held by him upon the trusts affecting the purchase-money; but where the vendor is tenant-for-life, or a person having the powers of a tenant-for-life, he is entitled to retain it as his own proper money.

The bonus may be assigned or charged by the person to whom it is payable, and a register of such assignments is now kept in the Land Commission where any such assignment should be registered.

CHAPTER III.

SUPERIOR INTERESTS.

Apportionment and Redemption—Legal Basis for Fixing Prices—Lands to be sold discharged of Superior Interests—Distribution of Purchase-money without Regard to—Exclusive Charge of, upon Indemnifying Lands.

Apportionment and Redemption.—Section 10 of the Act of 1885, and the Act of 1887 (section 15), enabled the Land Commission to order the redemption of any crown rent, quit-rent, or tithe rent-charge (*a*), or any apportioned part thereof, and enabled them to apportion them when any lands sold were subject with other lands to such charges; and section 16 gave power to deal in the same way with any annuity or rent-charge.

Jurisdiction to apportion and to fix the redemption price of superior interests, for the purposes of the Land Purchase Acts, is vested either in the Land Commission or the Land Judge.

Where the Land Judge is selling direct to tenants (Act of 1896, section 31, sub-section 4) he fixes the price; in other cases the price is fixed by the Land Commission. In both cases the jurisdiction is the same, and the legal basis for fixing the price is also the same.

Legal Basis for Fixing Prices.—In *Leader's Estate* (*b*) it was laid down in the Order of the Court of Appeal that "the redemption price of the rent ought to be fixed at the price which appeared upon due consideration of all the circumstances of the case—of the selling prices of similar interests,

(*a*) See Appendix, p. 125, *post*.
(*b*) [1904] 1 Ir. R. 374.

of the value of money, and of the fact that the redemption was compulsory—to be the fair value thereof; but that the amount of the said price ought not to be affected by the consideration of indemnifying the owner of the rent against loss of income by reason of the difference between the annual amount of the rent and the annual income of any investment in which the redemption money might be invested."

The actual price fixed in each case depends mainly upon the margin of security. If the amount of the head-rent or rent-charge to be redeemed is small in comparison to the net rental or poor law valuation of the lands, a high price will be fixed. In fixing the redemption price of all kinds of superior interests the element of compulsion should be taken into account. As much as 27½ years' purchase has been fixed for a well-secured head rent. The price to be given for crown and quit rents is determined by the Commissioner of Woods with the authority of the Treasury. There are no statutory rules regulating the price, but 25 years' purchase is usually accepted.

The price of tithe rent-charge payable to the Land Commission has been fixed at 22½ years' purchase. The price of land improvement and drainage charge is ascertained in accordance with a scale fixed by Acts under which they are payable (*See* Cherry's Irish Land Act, p. 193).

Lands to be sold discharged of Superior Interest.—The 31st section of the Act of 1896 provides that sales are to be made discharged from all superior interests as defined by the section (sub-section 1), and confers the jurisdiction to acquire every interest which stands between the Court and the fee-simple.

In the expression "superior interests" are included (section 31, sub-section 8) any estates, exceptions, reservations, conditions or agreements contained in any fee-farm grant or lease under which the land is held, and any reversion expectant on the determination of a lease for a term of years of which not less than sixty years are unexpired. And a

reversion vested in the Crown may now be compulsorily acquired (Act of 1903, section 98, sub-section 2).

Distribution of Purchase-money without regard to Superior Interest.—Where land sold under the Land Purchase Acts is subject, along with other lands, to any superior interest, but no payment has been made on foot of it out of the sold lands for not less than twenty years, if the other lands are a sufficient security for it, the purchase-money of the sold lands may be distributed without regard to it (Act of 1903, section 62, sub-section 1).

Exclusive Charge of, upon Indemnifying Lands.—Similarly, where sold lands liable to a superior interest are indemnified from it by other lands, which are a sufficient security for it, the Court may exclusively charge the indemnifying lands with it (Act of 1903, section 62, sub-section 3).

CHAPTER IV.

POSITION OF PURCHASING TENANT.

Tenant Purchaser Discharged from Antecedent Liability to Vendor—Interest on Purchase-money Payable till Annuity Begins—Where Advance Refused Parties Remitted to Original Position—Acquired Interest a Graft on Purchaser's Previous Interest—Holding Continues subject to Easements—Registration and Devolution of Purchased Lands—Conditions Imposed on Purchased Holding—Sub-division except with Consent of Land Commission Prohibited—Divesting by Bankruptcy—Sub-division on Death of Purchaser—Restriction on Power of Charging Holding—Assignment by Purchaser—Default in Payment of Purchase Annuity.

Tenant Purchaser discharged from Antecedent Liability to Vendor.—When an agreement to purchase is lodged with the Land Commission the tenant purchaser is, in the event of the sale being carrried out, discharged from all liability to the vendor in respect of any liabilities affecting the holding at the date of the agreement, including all rent and arrears existing at such date (Act of 1896, section 35, sub-section 1). In the interval between the signing of the agreement and the lands being declared "an estate," the tenant must be regarded as a purchaser in occupation of his holding. Until it is absolutely determined whether the agreement is to be carried out it is to be treated as an effective agreement for sale, and in the intervening uncertain period it is to be acted upon as such: *Earl Fitzwilliam* v. *Wicklow C. C.*, per Palles, C.B. (*a*). No proceedings may be brought in respect of rent and arrears of rent existing at the date of the agreement, pending the carrying out of the sale (section 35, *sup.*).

(*a*) 40 Ir. L. T. R. 180, 181.

Interest on Purchase-money payable till Annuity begins.—Interest on the purchase-money from the date of the agreement until the day when the purchase annuity begins is payable to and recoverable by the Land Commission, by whom it is paid over to the person in receipt of the rents and profits at the date of the agreement, or such other person as may prove himself entitled thereto.

If an advance is refused, and the agreement between the landlord and the tenant fall through, the amount of interest so paid to the landlord is to be allowed to the tenant as a payment on account of rent (Act of 1896, section 35, sub-section 2).

Section 35 has been applied with the necessary modifications to agreements with the Land Commission for the purchase from them of a holding (Act of 1903, section 18, sub-section 3), and to sales to tenants in proceedings before the Land Judge (Act of 1903, section 57). But in this latter case one year's arrears of rent is recoverable from the tenant (Act of 1903, section 57, sub-section 4).

Acquired Interest a Graft on Purchaser's Previous Interest.—The 8th section of the Purchase Act of 1885 provides that the interest vested in a tenant purchaser by the vesting order is to be deemed to be a graft upon the previous interest of the tenant in the holding and subject to any rights or equities arising from its being such graft (*a*). And section 14 of the Land Act of 1887 contains a similar provision as to the estate purchased being a graft when the holding is purchased by any person in occupation thereof, whether the interest in the tenancy is vested in him or not. The effect of this provision is that the new interest vested in the tenant purchaser becomes subject to all charges that at the date of the vesting order affected the interest of the tenant in the tenancy.

As well as the rights and equities of persons interested in the previous tenancy being thus kept alive, the rights of strangers to the tenancy are also preserved.

(*a*) See Appendix, p. 126, *post*.

Holding continues subject to Easements.—A holding vested in a purchaser continues to have appurtenant thereto, and to be subject to any previously existing easements, rights and appurtenances (Act of 1896, section 34).

Registration and Devolution of Purchased Lands.—Registration under the Local Registration of Title Act, 1891 (54 & 55 Vict., c. 66), is compulsory where land has been at any time sold and conveyed to or vested in a purchaser under the Land Purchase Acts. By section 84 of that Act freehold registered land so conveyed to or vested in a purchaser (without right of survivorship to any other person) shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives as if it were a chattel real vesting in them. And by section 81, the succession to the beneficial interest in such land on intestacy is made the same as if it were personal estate, as to which the registered owner had died intestate.

As between the Land Commission and the proprietor of any holding purchased by means of an advance under the Land Purchase Acts, important statutory conditions are imposed by the Act of 1903, section 54 (*See* Act of 1881, section 30).

Sub-division except with consent of Land Commission prohibited.—(1) The holding shall not be subdivided or let without the consent of the Land Commission. If it be, the Land Commission may cause the holding to be sold.

Divesting by Bankruptcy.—(2) Where the title of the holding is divested from the proprietor by bankruptcy, the Land Commission may cause the holding to be sold.

Sub-division on death of Purchaser.—(3) Where on the decease of the proprietor the holding would, by reason of any devise, bequest, or intestacy, or otherwise become subdivided or vested in more than one person, the Land Commission may require the holding to be sold to some one person within twelve months after they become aware of the death

of the proprietor, and if default is made in selling the Land Commission may cause the holding to be sold. Instead of causing the holding to be sold, on the request by any person interested, the Land Commission may nominate some person interested in the holding to be the proprietor, and provide for the satisfaction of the claims of other persons interested, including creditors of the deceased, by charging them upon the holding or otherwise.

Restriction on Power of Charging Holding.—The proprietor of a holding cannot now, without the consent of the Land Commission, mortgage or charge it for any sum or sums exceeding in the aggregate ten times the amount of the purchase annuity. Any mortgage made in violation of this restriction is void as to the excess.

Every mortgage or charge must be registered under the Local Registration of Title Act, 1891, within three months of execution, or, where the charge is created by will, within twelve months from probate (*a*). These conditions are imposed by the 54th section of the Act of 1903. They are similar to conditions provided by the 30th section of the Act of 1881, which is still in force as regards holdings purchased between 1881 and 1903. The Act of 1881 expressly imposed these conditions only "so long as such holding is subject to any charge in respect of an annuity in favour of the Land Commission"; but the same result would seem to follow from the opening words of section 54 of the Act of 1903—"As between the Land Commission and the proprietor."

Assignment by Purchaser.—It is to be noted that there is now no restriction on total alienation of a holding subject to a purchase annuity as there was under the Act of 1870.

Default in Payment of Purchase Annuity.—If the tenant purchaser makes default in payment of any instalment of the purchase annuity charged upon his holding, the Land Commission can exercise the power of sale and

(*a*) 7 Ed. VII., c. 38, section 2.

other powers given to mortgagees by the Conveyancing Act, 1881 (*a*) (*See* Act of 1887, section 18).

The sale of a holding may be made subject to the future payment of the annuity, and the High Court or the County Court, or the Land Commission, can issue an order to the sheriff to put the purchaser into possession. Or where the Land Commission are entitled to sell, they may obtain an order to put them (section 25, Purchase Act, 1891), or any person nominated by them (section 55, Act of 1903), into possession without actually selling.

Proceeds of Sale of Holding how Dealt with.—Where the Land Commission sell a holding the purchase-money is distributable as if it were the purchase-money of a holding sold by a landlord to a tenant (Act of 1896, section 38, sub-section 4). This enables the proceeds of sale, after discharging the claim of the Land Commission for all moneys due to them, to be paid to mortgagees and incumbrancers (if any) of the tenant purchaser's interest—to have the balance dealt with as the purchase-money of a landlord's estate would be dealt with by the Land Judge.

(*a*) 44 & 45 Vict., c. 41, sections 19, 21, 22.

CHAPTER V.

CONGESTED DISTRICTS AND CONGESTED ESTATES.

Congested Districts—Amalgamation, Migration, Emigration—Purchase by Tenant from Congested Districts Board—Purchase by Congested Districts Board from Land Judge—Purchase of Congested Estate by Land Commission.

Congested Districts.—Where more than twenty per cent. of the population of a county live in electoral divisions, of which the total rateable value when divided by the number of the population gives a sum of less than one pound ten shillings for each individual, those divisions by the Purchase Act, 1891 (section 36), form a separate county, called a Congested District (*a*).

Under the Purchase Act of 1891 the Congested Districts Board for Ireland was constituted, and £1,500,000 of the Church surplus was placed at its disposal for the purposes of the Act.

Amalgamation, Migration, Emigration.—These purposes include amalgamation of small holdings, power to aid migration and emigration, and the development of agriculture and industries (section 39).

The Congested Districts Board Act, 1893 (*b*), enables the Board to acquire and hold land for the purposes of the Act of 1891, but they can only purchase an estate mainly agricultural or pastoral, as section 10 of the Act of 1903 applies to purchases by the Board as well as to purchases by the Estates Commissioners: *Taffe's Estate* (*c*).

(*a*) The districts coming within this provision are confined to the counties of Donegal, Leitrim, Roscommon, Sligo, Mayo, Galway, Clare, Kerry and Cork.

(*b*) 56 & 57 Vict., c. 35.

(*c*) 39 Ir. L. T. R. 215-6.

Purchase by Tenant from Congested Districts Board.—The Land Commission may make an advance to a tenant for the purchase of his holding from the Congested Districts Board.

The Board may sell land to a tenant of a small holding for a price agreed upon to be secured by an annuity, and may convey the land to the purchaser charged with the said annuity (Act of 1896, section 44), which is collected by the Land Commission.

Purchase by Congested Districts Board from Land Judge.—Where the Congested Districts Board purchase land from the Land Judge (section 77) or from the owner under section 79 of the Act of 1903, it is their duty, not that of the Estates Commissioners, to declare the lands fit to be regarded as a separate estate so as to entitle the vendor to the bonus.

Purchase of Congested Estate by Land Commission.—The Land Commission may, under section 6, subsection 4, of the Act of 1903, purchase for the purpose of re-sale a "congested estate"—*i.e.*, an estate not less than half the area of which consists of holdings not exceeding five pounds rateable value or of mountain or bog land; and the conditions as to re-sale "without prospect of loss" may be relaxed to such extent as the Lord Lieutenant may determine.

CHAPTER VI.

EVICTED TENANTS.

The Evicted Tenants (Ireland) Act, 1907, 7 Ed. VII., c. 56, gives to the Estates Commissioners power, after publication of notice in the *Dublin Gazette* and service upon the persons interested, compulsorily to acquire land at such price as appears to them reasonable (not being demesne, a home farm, town park, garden, or pleasure grounds, or the property of a Railway Company) for evicted tenants or the sons of evicted tenants who, before 1st May, 1907, made application to be put in occupation of holdings. The number so to be reinstated is not to exceed two thousand.

No tenanted land can be compulsorily acquired under this Act unless it is in the occupation of a "new tenant"—*i.e.*, a tenant of a holding formerly occupied by an evicted tenant—and unless the Estates Commissioners consider it expedient that the evicted tenant should be reinstated. The section provided that no tenanted land should be compulsorily acquired which was in the possession or occupation of a *bona fide* tenant cultivating it as an ordinary farmer. By an amending Act of 1908 (8 Ed. VII., c. 22) this proviso is not to apply where the tenant consents in writing to the compulsory acquisition of the land by the Estates Commissioners.

The displaced "new" tenant may require full compensation for his interest in the holding which is taken from him, or he may be put into possession of a new holding subject to an annuity under the Land Purchase Acts not exceeding the rent of his former holding, and may be paid the reasonable expense of removal (section 4).

The landlord of land so compulsorily acquired, and any person interested, may present a petition to the Land Commission praying that the land shall not be so acquired without further inquiry. This petition is heard and determined by the Estates Commissioners, whose decision is final. Any person aggrieved by the price fixed by the Estates Commissioners may appeal to the Judicial Commissioner.

An owner of any land proposed to be acquired may offer to sell any other land as an alternative, and the Estates Commissioners shall consider any such offer (section 8). An appeal is also given, from the determination of the Estates Commissioners of questions arising under the provisions of the Act imposing restriction on the acquisition of land under the Act, either to the Judge of Assize of the County in which the land is situate or to a Judge of the King's Bench Division (section 2, sub-section 11).

CHAPTER VII.

PROCEDURE.

Proceedings for sale are initiated by filing in the Land Commission an originating application in a prescribed form, in which the proposed vendor swears that he is advised that he is a person having a power to sell the estate and lands, particulars of which are set out in a schedule, and are also shown upon verified ordnance maps. He also sets out in a schedule the deeds and documents showing *primâ facie* title to sell (*see* Act, 1903, section 17), and in a third schedule the claims of other parties (such as mortgagees and remaindermen) against the purchase-money; and also lodges particulars of the tenancies affecting the lands, with the names of the occupying tenants. This originating application and the documents of title must be submitted to counsel, and a certificate obtained from him that the vendor is a person having power to sell the lands under the Land Purchase Acts.

Where a "landlord" is about to sell directly to his tenants he enters into an agreement with each of them in a prescribed form that in case an "estate" comprising the holding shall be sold under the Irish Land Act of 1903, the vendor agrees to sell and the tenant to purchase his holding for a named sum. The tenant agrees to apply for an advance of £ for the purpose of the proposed purchase, to be repaid as provided by the Irish Land Act, 1903.

When an originating application along with the documents showing the vendor's title and counsel's certificate that the vendor has power to sell, have been lodged in the Land Commission, the vendor's title to the lands comes for investigation before one of a staff of Examiners of Title, who investigates the title, makes requisitions, and directs

necessary searches in the Registry of Deeds, &c. Where necessary the Examiner submits questions of law arising upon the title for the determination of the Judicial Commissioner, as the head of the Land Commission is styled.

As soon as the requisitions on title have been complied with, the Examiner, in a proper case, may settle and vouch an allocation schedule and issue a certificate that the case is a proper one for distribution of the purchase-money upon summary application. This course is only adopted where there are no claims except in respect of superior interests, Crown duties, and costs. In other cases the Examiner causes to be prepared and settles a final schedule of incumbrances, in which the various claims against the purchase-money are set out (*See* p. 95, *ante*).

Any person interested is entitled to lodge an objection to the final schedule, which will then be ruled on by the Judicial Commissioner; but if no objection is lodged, then the matter is entered in the Examiner's list for the purpose of having the claims on the schedule vouched, and when this has been done the schedule comes before the Judicial Commissioner, who rules it, and declares the various claimants and the owner entitled in their proper priorities to the amounts due, and directs payment.

APPENDIX

APPENDIX.

QUIT AND CROWN RENTS.

A QUIT rent is not necessarily a rent payable to the Crown, and, strictly speaking, means a rent payable to the lord, when the tenant goes *quit* and free of all other services ; but in Ireland this term is usually applied to those acreable rents which were reserved in Crown grants in fee-simple of lands forfeited in the rebellion of 1641.

TITHES AND TITHE RENT-CHARGE.

Tithes were the tenth part of the profits and stock of lands due to the Minsters of the Church for their maintenance. Down to the time of Henry VIII. tithes were exclusively the property of the Church, belonging to the Incumbent of the Parish, unless they had got into the hands of some monastery or community of spiritual persons. Upon the dissolution of the monasteries, grants of property formerly held by them were made to laymen, and comprised tithes which the monasteries had possessed as well as their landed estates. Tithes thus came for the first time into lay hands as a new species of property (*a*).

Both lay and ecclesiastical tithes continued to be paid in kind until in 1823, by Gouldburn's Act, 4 Geo. IV., c. 99, facilities were given for commuting both into money payments for limited periods, and in 1832, by 2 & 3 Will. IV., c. 119 (Stanley's Act), compositions were made compulsory and universal. The Acts passed for the commutation of tithes affected tithes in the hands of laymen as well as ecclesiastical tithes.

(*a*) Williams, Real Property, 20th ed., p. 436.

In 1838 the Tithe Rent-charge (Ireland) Act, 1838 (*a*), abolished the compositions and substituted rent-charges therefor. By the Tithe Rent-charge Act an annual rent-charge is made payable by the party having the *first* estate of inheritance in the lands.

All tithes payable to Ecclesiastical corporations, whether sole (Bishops) or aggregate in the year 1869, became vested in the Commissioners of Church Temporalities in Ireland under the Irish Church Act, section 12, and subsequently in the Irish Land Commission as their successors: 44 & 45 Vict., c. 71, sections 2, 4.

GRAFT.

It is a general principle enforced by Courts of Equity that no person in a fiduciary position accepting any benefit, attributable in any degree to that fiduciary position, can be allowed to enjoy such benefit for himself. The leading case is *Keech* v. *Sandford* (*b*), and see *M'Cracken* v. *M'Clelland* (*c*). In relation to the increased powers now conferred on a tenant-for life by the Settled Land Acts, 1882 (*d*), the 53rd section provides that a tenant-for-life shall, in exercising any power under that Act, have regard to the interests of all parties entitled under the settlement, and shall in relation to the exercise thereof by him be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

This principle by which the trust attaches to any benefit which a trustee as such obtains is in Ireland called "graft" (*See* judgment of FitzGibbon, L.J., *Dempsey* v. *Ward*(*e*). The Purchase Act of 1885 applies this principle in its 8th section, which provides that the interest acquired by a tenant purchaser is to be deemed a graft upon the previous interest of the tenant in the holding.

(*a*) 1 & 2 Vict., c. 109.
(*b*) 1 W. & T. L. C.
(*c*) Ir. R. 11 Eq. 172.
(*d*) 45 & 46 Vict., c. 38.
(*e*) [1899] 1 Ir. R. 463, 474.

REGISTRATION OF TITLE.—REGISTRATION OF DEEDS.

There are two distinct systems of Registration in force in this country—one, Registration of title; the other, Registration of deeds and other assurances.

Registration of Title.—The Local Registration of Title Act, 1891 (54 & 55 Vict., c. 66), provides for the establishment of registers of *owners* of land in local offices, with a central office in Dublin. This applies compulsorily to State-aided purchasers under the Land Purchase Acts.

On registration of a person as owner of land, the registering authority delivers to him a certificate of his title to the land. Before the first registration of any person as owner of land purchased under the Land Purchase Acts, the registering authority shall, if required, ascertain and enter on the register all burdens which appear to affect the land; but if not so required, the registering authority may dispense with the ascertainment of such burdens, and in that case the registration is made subject to any rights or equities arising from the interest vested in the purchaser being deemed to be a graft upon his previous interest in the land or arising in any other manner from the existence of such previous interest (*a*).

The registered owner may at any time apply to the registering authority to ascertain and enter on the register any burdens, the ascertainment of which may have been dispensed with, and when this has been done the note that the title is registered "subject to equities" shall be cancelled. As a general rule only persons beneficially entitled are registered as owners. In some instances trustees have been registered, but no trustee will be registered as owner unless he has a power of sale.

A registered owner may transfer the land; and on the registration of the transferee as full owner, there is vested

(*a*) 54 & 55 Vict., c. 66, s. 29.

in him an estate in fee in the land transferred, subject to the burdens registered as affecting it (section 35). On registering a transferee the registering authority delivers to him a certificate. This certificate is in fact the owner's title deed. It confers an indefeasible title, and "its security and plainness make it, for the purpose of personal credit, as useful and negotiable as the ordinary scrip of a joint stock company." The title of the registered owner is not, in the absence of actual fraud, to be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land.

Land registered under the Local Registration of Title Act is exempted from being registered in the Registry of Deeds (section 19).

Registration of Deeds.—The Registry of deeds was established by 6 Anne, c. 2 (Ir.), which provides for the registration of deeds, conveyances, and wills at the option of the grantees or devisees. To these judgments were added by 13 & 14 Vict., c. 29. The registry was established for securing purchasers, preventing forgeries and fraudulent gifts, and conveyances of lands, tenements, and hereditaments.

At common law the general rule is that different conveyances of the same land take effect according to their priority in time. But under the statutes a registered deed affecting lands takes priority over an unregistered deed or conveyance affecting the same lands. Deeds are *postponed, not invalidated*, by non-registration. Registered deeds and conveyances rank in priority *inter se* according to the date of their registration. The object of the Registry Acts is the protection of purchasers. They do not invalidate an unregistered conveyance as between the grantor and grantee; and, on the other hand, no additional force or validity is given by registration to the conveyance regarded by itself: *In re Cooper*; *Cooper* v. *Vesey* (*a*). The effect of the Registry Act

(*a*) L. R. 20 Ch. D. 611.

is to give priority by registration "according to the nature of the conveyance, the title of the person conveying, and rights to be affected by the conveyance." The registration of a deed fixes its priority without adding to its intrinsic force.

An equitable mortgage may be created by deposit of title deeds without writing, and is then unaffected by the provisions of the Registry Acts, and if prior in time takes priority over a registered deed. Hence the vital importance of requiring production of the title deeds upon any sale, transfer, or loan.

Judicial decisions of Courts of Equity have broken in upon the strict letter of the Registry Act by treating *actual notice* of an unregistered instrument, either to the party himself or his agent, as binding upon a purchaser under a registered deed. Such a purchaser cannot in Equity rely on the statutory priority given by the Registry Act. To do so would be *malâ fide*.

A registered deed is postponed by actual notice clearly proved, but constructive notice is not sufficient.

What has to be proved is *actual* knowledge of the existence of a prior unregistered deed present to the mind of a purchaser. With such knowledge it is fraudulent on his part to take and to register a conveyance in prejudice to the known title of another. This guilty knowledge may be proved by direct or circumstantial evidence. Notice through an agent will bind the principal. If a man or his agent actually knows of the existence of an unregistered instrument, when he takes his own deed, he may be estopped in equity from saying that as to him the prior deed is fraudulent. But it is not sufficient to bring home directly to the party claiming under it, or to his agent, knowledge of facts from which, in cases unconnected with registration, notice of the unregistered instrument would be inferred. Thus recitals in an instrument referred to in a registered deed which might have led to a discovery of a previous unregistered deed do

not amount to that clear proof of actual notice which the cases require. The object of the statute is accomplished if the person coming to register a deed has *aliunde*, and not by means of the Register, notice of a deed affecting the property, executed before his own: *Agra Bank* v. *Barry* (*a*).

And it is to be borne in mind that Registration, although it gives priority, does not amount to notice of the instrument registered.

DEVOLUTION OF ESTATE PUR AUTRE VIE.

Originally if an estate for the life of another was granted to a man without mentioning his heirs it became derelict: the heir could not take because he was not mentioned in the deed, and the executor could not take because the interest in the lands was not personalty. Anyone, it was held, might then enter for the residue of the life of the *cestui que vie*, and whoever entered was called the *general occupant*. If the heir *was* named in the deed the estate passed to him not as heir but as special occupant. The 9th section of the Statute of Frauds (7 Wm. III., c. 12, Ir.) provided that such an estate should be devisable by will, and that where no devise was made it should be charged with debts in the hands of the heir in case he was the special occupant, and that in case there was no special occupant it should pass to the personal representatives as part of the personal estate subject to the payment of the debts of the deceased. This section is repealed, but re-enacted by the Wills Act (1 Vict., c. 26, sections 2 and 6).

The devolution of a lease for lives in case of the death of the lessee intestate is to the heir if the lease or the last assignment is expressed to be made to the lessee *and his heirs*, otherwise it passes to the personal representatves as if it were personal estate. And tenancies held under agreements for leases for lives, in which there are no words of

(*a*) L. R. 7 H. L. 148.

limitation, devolve as personal estate, and do not pass to the heir: *Cornwall* v. *Saurin* (*a*).

"No words of inheritance are necessary to pass the entire interest in an estate *pur autre vie*; and however such estates may be limited, whether to *A.* simply, or to *A.* and his assigns, or to *A.* and his heirs, or to *A.* and his executors or administrators, *A.* has the whole dominion of such estates during his life, and may dispose of it to whom and in what manner he pleases. At the common law he could do this by deed; and by the Statute of Frauds prior to the Wills Act, and since by the 3rd section of that Act, he can do so by devise. In exercising this power he may change as he pleases the limitations of the tenure. Even though his own grant be to him, his heirs and assigns, he can convey the estate to a grantee simply by name, without more; or he may convey it to the grantee, his heirs and assigns, or to the grantee, his executor, and administrators, thus changing the whole character of the estate and converting the freehold into personalty": *Croker* v. *Brady* (*b*).

(*a*) 17 L. R. Ir. 595.
(*b*) 4 L. R. Ir. 657, per Sullivan, M.R.

INDEX